Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

FIDELITY TECHNOLOGIES CORPORATION,

Petitioner,

v.

LONNIE B. BUTLER, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Louisiana Third Circuit Court Of Appeal

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May employees of a federal contractor circumvent the exclusive remedial provisions of the Service Contract Act by bringing a state law claim that imposes monetary penalties and attorneys' fees for violations of the Act?

PARTIES TO THE PROCEEDING

The petitioner is Fidelity Technologies Corporation.

The respondents are Lonnie Butler, Audrey Anderson, Robert Armer, W.L. Basco, Linda Behan, James Bryant, Loyil Cryer, Lane Dunn, Karan Mahlen, Joseph Martin, Margaret Mayo, Frances Melchiorri, Donald Savant, Ramona Smart, Harold Staples, and Ruby Hutson.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, petitioner Fidelity Technologies Corporation certifies that it has no parent companies, non-wholly-owned subsidiaries, or affiliates that have issued shares to the public.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Fidelity Technologies Corporation ("Fidelity") respectfully requests that a writ of certiorari issue to review the decision of the Louisiana Court of Appeal for the Third Circuit, entered on December 26, 1996.

OPINIONS BELOW

The opinion of the Louisiana Court of Appeal for the Third Circuit in this case is reported at 685 So.2d 676 and is reprinted in the appendix hereto ("App.") at App. 2. The Louisiana Supreme Court's order denying an application for a writ of certiorari is reprinted at App. 1. The decision of the Thirtieth Judicial District Court of Louisiana is reprinted at App. 13.

JURISDICTION

The judgment of the Louisiana Court of Appeal for the Third Circuit was entered on December 26, 1996. Petitioner's timely petition for a writ of certiorari was denied by the Louisiana Supreme Court on March 21, 1997. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257.

PERTINENT STATUTORY PROVISIONS

The relevant provisions of the Service Contract Act, 41 U.S.C. §§ 351-358, are reprinted at App. 21. Louisiana Revised Statutes 23:631 and 23:632 are reprinted at App. 28 and App. 30, respectively.

STATEMENT OF THE CASE

1. This case raises the issue of whether respondents, the former employees of petitioner, may bring suit under state law to enforce contract rights that are based solely on the Service Contract Act, 41 U.S.C. §§ 351-358 ("SCA" or the "Act"). The SCA was enacted in 1965 to ensure that workers whose employers entered into service contracts with the federal government received minimum wages and fringe benefits based on the prevailing rates in the locality in which the contract was performed. In essence, the SCA extended to service employees the same rights that the Davis-Bacon Act, 40 U.S.C. § 276, *et seq.*, provided to employees working for federal construction contractors.

The SCA requires that every federal government contract exceeding $2,500 (with exceptions not relevant here), "the principal purpose of which is to furnish services . . . through the use of service employees," contain minimum wage provisions for each class of service employees in the performance of the contract. 41 U.S.C. § 351(1). More specifically, the SCA provides that contracts and bid specifications must contain "(1) A provision specifying the minimum monetary wages to be paid the various classes of service employees" and "(2) A provision specifying the fringe benefits to be furnished the various classes." 41 U.S.C. § 351(a)(1)-(2). As to each such provision, the statute requires the Secretary of Labor to make a determination of the applicable minimum wages and fringe benefits based on prevailing rates in the locality of the performance of the contract. Pursuant to these statutory duties, the Secretary of Labor has promulgated an extensive body of regulations which govern this

determination. These regulations apply to the SCA, the Davis-Bacon Act, as well as to over 55 other statutes listed in the regulations, all of which require the determination of minimum wages for the protection of workers under federal or federally-assisted contracts.

The SCA also sets forth an exclusive remedial scheme for employees who assert a violation of the statute's substantive provisions. Under the Act, an employee alleging a violation of the SCA must file a complaint with the Department of Labor. 29 C.F.R. § 4.191. The employee may assert a right to recovery either as a result of underpayment or non-payment of compensation due under the Act. 29 C.F.R. § 4.187. Under its exclusive jurisdiction to enforce the SCA, the Department of Labor is charged with investigating any complaints filed by employees. If a violation of the Act is found, the Department of Labor may withhold from the contractor such funds as are necessary to pay the employees. *Id.* Only if such funds are not sufficient to remedy a violation of the SCA is the Secretary of Labor authorized to file suit to recover the funds necessary to make the employees whole under the Act. The SCA makes no provision for employees to file suit on their own behalf to recover for violations of the Act. Under this exclusive remedial regime, punitive damages and attorneys' fees are not available.

2. In 1991, petitioner entered into a contract with the Seventh Signal Command of the United States Army to provide operation and maintenance services for the administrative telephone system at Fort Polk, Louisiana. The contract incorporated the SCA by reference. Accordingly, respondents, who were employees of petitioner, were entitled to receive such wages and fringe benefits as

the Secretary of Labor determined to be prevailing in that locality. Petitioner continued to provide services under the contract until November 4, 1992, when the contract was "novated" to another services contractor, Dynamic Concepts, Inc. ("DCI"). Under the novation agreement, DCI "assumed all obligations and liabilities" of petitioner under the contract.

At the time the novation agreement was executed, respondents became employees of DCI. Prior to this agreement, respondents had accrued unused vacation days for which they sought payment from petitioner. Petitioner maintained, however, that under the terms of the novation agreement, DCI was liable for any accrued, unused vacation days and thus denied respondents' request for vacation pay in the aggregate amount of approximately $6,200. DCI was unwilling to make these payments and thus submitted this dispute to the Department of Labor pursuant to the remedial scheme established by the SCA. In conformance with these procedures, respondents also requested the Department of Labor to resolve this dispute and to require petitioner to make such payments. Specifically, on January 6, 1993, respondents wrote to the Department of Labor notifying the Department that "a formal complaint [is hereby] filed by the former manager and employees of Fidelity Technologies, Inc. regarding earned vacation time denied to us by [Fidelity]." App. 31.

On December 8, 1994, respondents commenced the instant litigation in the Thirtieth Judicial District Court of Louisiana. Respondents sought all wages and benefits owed but not yet paid under the contract, as determined by the SCA. Respondents also sought punitive damages

and attorneys' fees available under Louisiana law.[1] Specifically, respondents requested punitive damages in the amount of $150,000 – an amount twenty-four times greater than their actual damages. Shortly after the complaint was filed, the Department of Labor issued its decision that petitioner was liable for the unused vacation days. Petitioner promptly tendered the approximately $6,200 that respondents had sought. Respondents, however, declined to accept such payment.

3. Petitioner filed a declinatory exception in the district court on the ground that the court lacked subject matter jurisdiction. Petitioner maintained that in light of the exclusive administrative remedy available under the SCA, respondents did not have a private cause of action for a claim that was premised solely on a violation of the SCA.

The district court granted petitioner's motion and held that it had "no jurisdiction to adjudicate this particular matter." App. 17. As a threshold matter, the court noted that the contract between petitioner and respondents was governed by the SCA and thus fell within the

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[1] Under Louisiana Revised Statute 23:631 (App. 28), a discharged employee is entitled to be paid for any wages or benefits outstanding within three days of the discharge. If an employer fails to comply with this provision, it "shall be liable to the employee either for ninety days wages at the employee's daily rate of pay, or else for full wages from the time the employee's demand for payment is made until the employer shall pay or tender the amount of unpaid wages due to such employee, whichever is the lesser amount of penalty wages." Louisiana Revised Statute 23:632 (App. 30). Under this latter provision, reasonable attorneys' fees are also available.

scope of its remedial provisions. App. 16-17. The district court rested is conclusion on the D.C. Circuit's decision in *Danielsen v. Burnside-Ott Aviation Training Ctr., Inc.*, 941 F.2d 1220 (D.C. Cir. 1991), which held that an employee does not have a private right of action under the SCA and that the statutory administrative remedy is exclusive. The district court concurred and held that Congress had conferred "exclusive jurisdiction [on] the Department of Labor" to award relief for violations of the SCA. App. 17. The court elaborated:

> I do not believe, under those circumstances, that it's appropriate for this court to undertake to make that determination applying the law of the State of Louisiana as opposed to applying the determinations made by the Department of Labor both as to the prevailing rates and fringe benefits which would be due and as to compliance with the obligation imposed to pay the wages and fringe benefits which would be due.

App. 17.

4. The Louisiana Third Circuit Court of Appeal reversed, holding that respondents were entitled to bring their claims that rested upon violations of the SCA under state law and to press their claims for punitive damages and attorneys' fees. As an initial matter, the court noted that the SCA "does not explicitly nor implicitly address the issue of *non-payment*" of prevailing wages and fringe benefits. App. 6 (emphasis added). The court reached this conclusion without citing to or even mentioning the applicable regulations, which specifically state that the term "underpayments" under the Act "*includes non-payment.*" 29 C.F.R. § 4.187 (emphasis added). Secondly, the

court held that the SCA did not preempt Louisiana law compelling employers to pay the earned wages of an employee promptly after his dismissal. App. 11-12. The court stated that the Louisiana law allowing for the recovery of punitive damages and attorneys' fees served to effectuate the purposes of the SCA by ensuring that employees received the amount due under the Act. The court of appeals simply ignored the district court's conclusion that the administrative remedies provided by the SCA were exclusive and that respondents were thus disabled from enforcing the SCA under state law. The court of appeals made no reference to *Danielsen* or to the other federal appellate cases which have held that the remedies identified under the SCA are exclusive. *See, e.g., Miscellaneous Serv. Workers v. Philco-Ford Corp.*, 661 F.2d 776 (9th Cir. 1981); *District Lodge No. 166, Int'l Ass'n of Machinists and Aerospace Workers v. TWA Serv., Inc.*, 731 F.2d 711 (11th Cir. 1984), *cert. denied*, 469 U.S. 1209 (1985).

Petitioner timely filed a petition for a writ of certiorari with the Louisiana Supreme Court. On March 21, 1997, the Louisiana Supreme Court denied the application for the writ.

REASONS FOR GRANTING THE WRIT

The Louisiana court's decision presents an important legal question regarding the nature of the remedies available under the SCA and similar federal statutes. That question is whether covered employees may circumvent the exclusive administrative remedy established under the SCA by asserting state law claims that are based

solely upon a violation of the Act. The court's holding will necessarily undermine the important interests furthered by the SCA's exclusive remedial provisions, which confer on the Department of Labor the sole authority to ensure that employees covered by the SCA receive wages equal to the prevailing rate in the place of performance. Specifically, Congress's establishment of a carefully circumscribed enforcement mechanism furthers the goals of efficient administration of the Act, centralized enforcement by an expert administrative agency, and limiting the amount of litigation necessary to enforce the statute.

This case also presents a stark conflict between the decision below and the federal circuit courts of appeals as to the proper scope of the remedies available under the SCA. Three federal courts of appeals and numerous district courts have addressed this issue, all uniformly acknowledging the exclusive nature of the remedy provided under the SCA. As a result, the federal courts have held that there is no private right of action under the Act and have consistently dismissed claims under other laws when premised on a violation of the SCA.

In contrast, the Louisiana court ignored the exclusivity of the remedy provided by Congress under the SCA and allowed respondents to assert a state law claim that is predicated on a violation of the Act. The court below failed to recognize that just as the exclusive nature of the Act's remedy compels a conclusion that there is no private right of action, so too it necessarily prohibits covered employees from bringing state claims that are premised on a violation of the SCA. As the D.C. Circuit held in *Danielsen*, plaintiffs cannot evade the carefully circumscribed remedies available under the SCA by

merely reformulating their claims under a different statute. Indeed, this Court has made clear on several occasions that a plaintiff may not evade an exclusive remedial scheme " 'by the simple expedient of putting a different label on the pleadings.' " *Brown v. General Serv. Admin.*, 425 U.S. 820, 833 (1976) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973)). As the federal courts have recognized, the language and structure of the Act demonstrates that Congress intended the administrative remedy established thereby to be exclusive. Since the SCA's remedy is exclusive, it preempts state law claims premised on SCA violations just as it forecloses federal claims which seek to evade the SCA's remedial scheme.

If not corrected, the decision below will introduce considerable confusion into the enforcement of the SCA. Allowing covered employees to pursue punitive damages and attorneys' fees under state law will render the enforcement mechanisms established by Congress entirely obsolete. No plaintiff will pursue the limited remedies available under the federal statute when a more generous measure of damages is available under state law. In this case, for example, respondents seek punitive damages that are 24 times greater than the damages awarded to them by the Department of Labor. Conflicting results would arise not only between states but even under the same contract if one employee invoked the administrative remedies available under the federal statute and another employee brought suit in state court. Furthermore, the anomalies created by this conflict between the Louisiana courts and the federal courts must be understood in the broader context of the panoply of virtually identical federal statutes, such as the Davis-

Bacon Act, which have themselves been subject to similar misinterpretation. This case presents the Court with the opportunity to resolve this substantial conflict.

I. The Decision Below Is Plainly Erroneous And Is In Conflict With The Decisions Of Three Federal Courts of Appeals.

The decision of the Louisiana court allows employees of federal servicing contractors to assert state law claims that are premised solely on a violation of the SCA. Respondents' state law claim was for unpaid wages and benefits, and related penalties. Obviously, this claim is entirely dependent on determining the wages and benefits owed under their contract with petitioner, which itself is governed by the SCA.[2] The Louisiana court failed to acknowledge the exclusive nature of the SCA's remedial provisions and thus allowed respondents to maintain

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[2] The court below sought to avoid this conclusion by stating that "[t]he SCA does not explicitly nor implicitly address the issue of non-payment." App. 6. Yet, the distinction drawn by the Louisiana court is utterly specious. It is obvious that an employee is *underpaid* by any amount that the employee is *not paid*. In any event, it is inconceivable that Congress sought to ensure that employees of federal servicing contractors were not underpaid, but was indifferent to whether such employees were paid at all. Not surprisingly, the regulations confirm that the SCA's protection against underpayment includes non-payment of such employees. *See* 29 C.F.R. § 4.187 ("any violations of any of the contract stipulations required [by the SCA] shall render the party responsible liable for the amount of any deductions, rebates, refunds, or *underpayments (which includes non-payment)* of compensation due to any employee engaged in the performance of the contract.") (emphasis added).

their state law claim for penalties for non-payment of the wages and benefits owed, and attorneys' fees. Thus, the decision below is plainly inconsistent with the structure and purpose of the SCA's enforcement provisions, and with the decisions of three federal courts of appeals.

Under the SCA, an aggrieved employee of a federal servicing contractor has one, and only one, available remedy. Namely, the employee may file a complaint, as respondents did here, with the Department of Labor pursuant to 29 C.F.R. § 4.191. The Department alone can enforce the statute by withholding from the relevant agencies any amounts owed to the contractor that would satisfy its obligations to its employees. If such withholding will be insufficient or is not possible, the Department is authorized to bring suit against the contractor for the amount owed.

As this framework suggests, Congress in enacting the SCA established a carefully circumscribed remedial scheme to be administrated by a centralized expert agency in a uniform manner. The Louisiana court's decision runs afoul of this Court's well-established rule of statutory construction:

> Congress for reasons of its own decided upon the method for the protection of the "right" which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. . . . [I]t is for Congress to determine how the rights which it creates shall be enforced. In such a case the specification of one remedy normally excludes another.

Switchmen's Union of N. Am. v. National Mediation Bd., 320 U.S. 297, 301 (1943) (citations omitted). *See also Northwest*

Airlines, Inc. v. Transport Workers Union of Am., 451 U.S. 77, 94 (1981) ("It is, of course, not within our competence as federal judges to amend these comprehensive enforcement schemes by adding to them another private remedy not authorized by Congress."); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) ("A frequently stated principle of statutory construction is that when legislation expressly provides a particularly remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' ") (quoting *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929)).

The Louisiana court ignored the careful balance struck by Congress in enacting a comprehensive and specific remedial scheme under the SCA. The state court's decision enforcing a state-law right of action based on a violation of the SCA is flatly inconsistent with directly analogous decisions of three federal courts of appeals.

In *Danielsen v. Burnside-Ott Aviation Training Ctr., Inc.*, 941 F.2d 1220 (D.C. Cir. 1991), employees sought to bring a claim based upon violations of the SCA under the Racketeer Influenced and Corrupt Organizations Act ("RICO") and under a state common law fraud theory. The court dismissed the complaint on the ground that "the remedy provided in the SCA is *exclusive*." *Id.* at 1222 (emphasis added). Starting from this premise, the court concluded that there was no private right of action under

the SCA. *Id.* at 1228. In applying the four-fold test articulated in *Cort v. Ash*, 422 U.S. 66 (1975),[3] the court focused on the second factor relating to whether there is any indication of a legislative intent to create such a remedy. The court concluded that "*[n]othing* in the language of the SCA provides any indication that Congress intended to create a private cause of action." *Id.* at 1227 (emphasis added). Moreover, the court held that such a remedy "would be so inconsistent with the legislative scheme underlying the right as to be unthinkable." *Id.* The court reasoned that where Congress has established a "comprehensive administrative" enforcement mechanism, such specification "normally excludes duplicative judicial jurisdiction." *Id.* (internal citations omitted).

The D.C. Circuit also noted that a contrary conclusion would effectively eviscerate the enforcement mechanisms established by Congress. The court queried:

> "[W]hat plaintiff will pursue his administrative remedies under the Act where more direct and

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[3] Specifically, in determining whether an implied right of action exists under a statute, the Court asks (1) whether the plaintiff is one of a class for whose special benefit the statute was created; (2) whether there is any indication of a legislative intent to fashion such a remedy; (3) whether it is consistent with the underlying legislative scheme to apply such a remedy; and (4) whether the cause of action is one traditionally relegated to state law so that an implied federal cause of action would be inappropriate. *Id.* As the Court's more recent pronouncements make clear, "what must ultimately be determined is whether Congress intended to create the private remedy asserted." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979) (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979)).

> expeditious relief is available in a private suit?" How much more the case where plaintiffs couch their complaint in terms of RICO to give them, not a remedy equal to that provided under the SCA, but three times that remedy? How much more still where their attorneys would be extracting their fees not from their clients but from the other side? Thus, the ingenious pleading of the action in RICO terms rather than in straight SCA language cuts against the implication of the right of action rather than in its favor.

Id. at 1228 (quoting *Miscellaneous Service Workers*, 661 F.2d 776, 781 (9th Cir. 1981)). In the D.C. Circuit's view, these practical considerations strongly counseled against undermining the SCA's exclusive remedial scheme by finding an implied right of action.

In the instant case, these same considerations demonstrate the dramatic effect that the Louisiana court's ruling will have. Here, respondents seek damages 24 times greater than those which were awarded to them by the Department of Labor. Their attorneys also seek their fees from petitioner. With such a financial bonanza available under state law, few employees indeed will submit their claims to the Department of Labor.

The D.C. Circuit's decision is particularly instructive because plaintiffs sought to cloak their claims, which were premised on a violation of the SCA, under a separate statutory cause of action. The court noted that "[t]he factual allegations are precisely the same" under both the SCA and RICO. Accordingly, it concluded that "[t]o frame the action . . . in terms of RICO adds nothing." *Id.* at 1228. Thus, the D.C. Circuit foreclosed plaintiffs from circumventing the exclusive administrative remedies

established under the SCA by pleading their claims for unpaid wages and benefits, and related penalties, under a different statute.

In reaching this result, the D.C. Circuit closely followed the Ninth Circuit's decision in *Miscellaneous Serv. Workers v. Philco-Ford Corp.*, 661 F.2d 776 (9th Cir. 1981). Starting from the proposition that "Congress intended to provide for exclusive administrative enforcement of the SCA," the Ninth Circuit held that there is no private right of action under the Act. *Id.* at 780. In analyzing whether to imply a private right of action under *Cort v. Ash*, the Ninth Circuit stated: "The Act does not specifically grant a private right of action, and nothing in its language or history compels us to believe that such a right may be implied. On the contrary, *a plain reading of the statute evidences a clear legislative intent to restrict employee remedies under the Act to administrative channels.*" *Id.* at 779 (emphasis added). In addition to its conclusion that "nothing supports an inference of a legislative intent to create private remedies under the Act," the Ninth Circuit reasoned that "it would be flatly inconsistent with the express provision of a limited governmental cause of action to imply a wide ranging private right of action as an alternative to a government suit." *Id.* at 780 (citing *Switchmen's Union of N. Am. v. National Mediation Bd.*, 320 U.S. 297, 301 (1943)). Since its decision in *Miscellaneous Services Workers*, the Ninth Circuit has reaffirmed its conclusion that no private right of action exists under the SCA. *See, e.g., Barron v. Reich*, 13 F.3d 1370 (9th Cir. 1994).

The other federal courts to have considered this issue have uniformly upheld the SCA's exclusive remedial scheme by refusing to imply a private right of action

upon employees covered by the Act. In *District Lodge No. 166 v. TWA Serv., Inc.*, 731 F.2d 711 (11th Cir. 1984), the Eleventh Circuit endorsed the Ninth Circuit's reasoning in *Miscellaneous Service Workers*. Specifically, the Eleventh Circuit noted that the legislative history of the SCA made it clear that the administrative enforcement mechanism was intended to be exclusive and to foster "more efficient administration" of the Act. *Id.* at 715 (quoting S. Rep. No. 1131, 92d Cong., 2d Sess. 5 (1972)). The court also noted that the Senate Report emphasized Congress's desire to provide for "expeditious" decisions on complaints by employees. The court held that implying a private right of action would undermine these congressional objectives.[4]

As these cases illustrate, the federal courts have identified several important policies that are furthered by

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[4] The district courts that have considered this issue have uniformly reached the same conclusion. *See, e.g., Foster v. Parker Transfer Co.*, 528 F. Supp. 906 (W.D. Pa. 1981) (declining to find a private right of action and dismissing complaint because, "[a]lthough the plaintiffs styled this case as a diversity action, it is clear that the gravamen of their complaint is that they were not paid by the defendant in accordance with the [SCA]"); *Nichols v. Mower's News Serv., Inc.*, 492 F. Supp. 258, 261 (D. Vt. 1980) (dismissing suit for nonpayment of wages in connection with a contract subject to the SCA because the Department of Labor has "sole authority for enforcing the Act"); *Oji v. PSC Envtl. Management Inc.*, 771 F. Supp. 232, 234 (N.D. Ill. 1991) (dismissing diversity suit alleging breach of a contract governed by the SCA because the court acknowledged that "the Secretary of Labor . . . has exclusive jurisdiction to enforce the SCA" and thus "agree[d] with the conclusion of the Ninth and Eleventh Circuits that the SCA neither explicitly nor implicitly authorizes a private cause of action").

Congress's selection of an exclusive administrative remedy for violations of the SCA. Each of these policies will be substantially undermined, if not totally negated, by the Louisiana court's decision below. Specifically, the federal courts have noted that the legislative history is clear that Congress intended its enforcement mechanism to further the "efficient administration" of the Act. *See District Lodge No. 166*, 741 F.2d at 715. Far from advancing the efficient administration of the SCA, however, the decision below would ensure that violations of the SCA would now be pursued and resolved in each of the fifty states. Of course, if employees were able to bring suit in each state, there would be a maze of different interpretations and remedies available for violations of the SCA, which would in turn undermine an efficient and uniform application of the Act. Furthermore, it is clear from the statute's structure that Congress intended to minimize litigation resulting from violations of the SCA. As the Ninth Circuit noted in *Miscellaneous Service Workers*, 661 F.2d at 780, even the Department of Labor has only a contingent right to bring suit to enforce the Act. Yet, by allowing employees to receive punitive damages and attorneys' fees under state law, the Louisiana court's decision all but ensures that employees will disregard the federal administrative remedy and will pursue their claims in state court. The litigation explosion that would be engendered by such a rule directly undermines Congress's attempt to minimize litigation enforcing the Act.[5]

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[5] It should be noted that the SCA is only one of over 55 federal statutes, including the Davis-Bacon Act, aimed at ensuring that employees of federal contractors receive prevailing wages, and thus the effect of the Louisiana court's

Moreover, if the Louisiana court's decision below is allowed to stand, it is virtually assured that federal service contractors will be subject to conflicting liability depending upon which state court they are sued in. In essence, the decision below establishes a dual enforcement regime in which employees may select the forum (state court or the Department of Labor) which yields the most advantageous resolution of their claims.

Indeed, the lower court's ruling poses the direct potential for inconsistent judgments in the same case, since the state court could disagree with the Labor Department's conclusion on the wages and benefits owed.[6] Here, respondents have availed themselves of this

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decision has broad significance. Indeed, at least one state court has found an implied private right of action under the Davis-Bacon Act despite federal appellate decisions to the contrary. *Compare Stampco Constr. Co., Inc. v. Guffey*, 572 N.E.2d 510 (Ind. App. 1991) (implied private right of action under Davis-Bacon Act) *with Glynn v. Capeletti Bros., Inc.*, 621 F.2d 1309 (5th Cir. 1980) (finding no such right).

[6] As noted above, the instant suit was brought before the Department of Labor's ruling was issued, and the Louisiana court found that the SCA did not address nonpayment of wages. Thus, the decision below did not rely in any way upon the Department's determination of liability. Under the lower court's rationale, a state could determine the wages owed under the SCA and need not await a decision from the Department of Labor. Moreover, even if the state court did defer to the Department in cases where the statutory remedy was invoked, employees would still be able to seek supplemental state law remedies. Thus, the Louisiana statute operates as a retroactive penalty upon employers who abide by the SCA's enforcement mechanism. The availability of punitive damages seriously disrupts the remedial scheme established under the SCA.

very tactic by pursuing their claims before *both* the Department of Labor and the Louisiana state courts. Beyond the conflicting results from the state courts that would result if the Louisiana court's interpretation of the SCA is maintained, conflicting remedies might be awarded under the same contract. For example, respondents were awarded $6,200 by the Department of Labor in connection with the complaint they filed. If they had adhered to the Department's determination of liability, that is all they would have received. Yet, if other employees of petitioner had sought damages in Louisiana state court, they might receive monetary penalties 24 times that amount, as well as attorneys' fees. Such an absurd result is flatly inconsistent with the exclusive enforcement mechanism that Congress established under the SCA.

II. The Decision Below Incorrectly Applied Settled Principles Of Preemption.

Rather than adhering to this unbroken line of federal appellate decisions, the court below refused to acknowledge the exclusivity of the administrative remedy provided by the SCA. In determining that the SCA does not preempt respondents' claim, the court disregarded the important congressional purposes behind the SCA's uniform, centralized enforcement mechanism. Thus, the Louisiana court's reasoning cannot be reconciled with either the federal decisions cited above or traditional preemption analysis.[7]

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[7] As a threshold matter, we note the close relationship between the concepts of preemption and implied private rights

Respondents' claim necessarily implicates and rests solely upon a violation of the SCA. To be sure, respondents invoke Louisiana state law and maintain that petitioner violated state law by not paying them in a timely manner for the vacation time they had accrued at the time of their discharge. Yet, in determining the validity of this claim, namely how much respondents are owed and by whom, the court's analysis is entirely dependent upon the SCA, which was incorporated into the contract at issue here. The SCA governs both the amount that respondents are due and the party that is liable for such amount. Indeed, respondents acknowledged as much when they filed their complaint with the Department of Labor. Given that respondents' claim rests solely upon their rights under the SCA, "to frame the action . . . in terms of [state law] adds nothing." *Danielsen*, 941 F.2d at 1228. If a contrary rule were permitted, "the crucial administrative role that [the Department of Labor] . . . was given by Congress . . . would be eliminated 'by the simple expedient of putting a different label on (the) pleadings.' " *Brown v. General Serv. Admin.*, 425 U.S. at 833

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of action. Indeed, the D.C. Circuit in analyzing the exclusive nature of the SCA's remedial scheme recognized the somewhat "inconsistent" usage of the term preemption in the context of federal labor law. *Danielsen*, 941 F.2d at 1227. For example, the Court in *Amalgamated Ass'n of Street, Elec. Ry. and Motor Coach Employees v. Lockridge*, held that the National Labor Relations Act "preempts state and *federal* court jurisdiction to remedy conduct that is arguably protected or prohibited by the Act." 403 U.S. 274, 276 (1971) (emphasis added). *Cf. Foster*, 528 F. Supp. at 906 (dismissing diversity common law contract suit based on violation of the SCA under implied private right of action analysis).

(quoting *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973)). *See also, Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985) (preempting labor-contract claims brought under state tort law because "[a]ny other result would elevate form over substance and allow parties to evade the requirements of the [Labor Management Relations Act] by relabelling their contract claims as claims for tortious breach of contract."). In short, respondents should not be allowed to circumvent the exclusive administrative remedies of the SCA by reformulating their claims under state law.

As a result of its failure to acknowledge the exclusivity of the SCA's remedial scheme, the Louisiana court's preemption analysis is seriously flawed. It is well-established that in determining the preemptive effect of a federal statute, " '[t]he purpose of Congress is the ultimate touchstone.' " *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Malone v. Light Motor Corp.*, 435 U.S. 497, 504 (1978)). In considering the congressional intent behind the SCA, the Louisiana court below merely stated: "Depriving Louisiana employees of this remedy would be inconsistent with the objectives of the SCA when the SCA seeks to ensure that these same employees are guaranteed the same benefits as other employees in the same locality and state." App. 12. Essentially, the court reasoned that allowing employees to bring suits under state law for punitive damages and attorneys' fees furthers the purposes of the SCA by punishing federal contractors that violate the statute. Yet, the court's analysis fails to acknowledge the important congressional purposes inherent in the exclusive remedial scheme established under the SCA. As noted above, the structure

of the Act and the legislative history make clear that this enforcement act mechanism was aimed at insuring the "efficient administration" of claims arising under the Act. By vesting the Department of Labor with the sole authority to enforce the Act, Congress sought to maintain a uniform remedial scheme. Moreover, the structure of the Act, specifically the limited public cause of action conferred and the lack of a private cause of action, demonstrate that Congress sought to minimize the amount of litigation arising under the Act. The Louisiana court's decision directly undermines each of these important congressional purposes. By allowing plaintiffs to seek substantial punitive damages and attorneys' fees, the court's decision virtually insures that the carefully crafted administrative enforcement mechanism provided by the Act will be rendered obsolete. Thus, far from furthering the purposes of the SCA, the decision below is at war with the administrative enforcement mechanism established by Congress.

The Louisiana court's decision runs afoul of two distinct lines of this Court's preemption cases. *See Building and Constr. Trades Council of Metro. Dist. v. Associated Builders and Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 224-25 (1993) (describing the separate lines of preemption analysis that have been applied to federal labor law). In *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), the Court held that state courts are preempted from awarding damages in connection with activities regulated by the National Labor Relations Board ("NLRB"). Noting that Congress had established an exclusive forum for resolving disputes under the National Labor Relations Act ("NLRA"), the Court explained the significance of

this exclusive process for adjudicating disputes under the NLRA in terms that are equally applicable to the exclusive enforcement mechanism established under the SCA:

> We have necessarily been concerned with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of substantive law and differing remedial schemes. But the unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience. . . . "Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. . . . "

Id. at 242, 243 (quoting *Garner v. Teamsters*, 346 U.S. 485, 490-91).

Just as Congress determined that the NLRB had "exclusive competence" over matters arising under the NLRA, so too the Department of Labor has been designated as the exclusive adjudicatory forum for resolving disputes under the SCA. *Id.* at 245. By allowing respondents to enforce their state law claims based solely on

violations of the SCA, the Louisiana court transgressed this Court's admonition that to "allow two law-making sources to govern" in an area of exclusive federal policy is impermissible. *Id.* at 247.

Additionally, the Louisiana court's decision upsets the careful balance struck by Congress in determining the remedies available under the SCA by authorizing employees to receive punitive damages and attorneys' fees. This Court has repeatedly preempted state laws where they "would interfere with Congress' integrated scheme of regulation by adding a remedy to those prescribed by [an exclusive remedial scheme]." *Wisconsin Dep't of Indus. v. Gould Inc.*, 475 U.S. 282, 287 (1986) (internal citations omitted). Likewise, in *Lodge 76, Int'l Ass'n of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), the Court noted that by defining the "economic sanctions" available under the NLRA, "Congress struck the balance . . . between the uncontrolled power of management and labor to further their respective interests." *Id.* at 146 (internal citations omitted). The Court held that to confer an additional "economic weapon" on an employee impermissibly disturbed this balance and therefore would be preempted. *Id.* at 147. Here, the Louisiana court's decision arms employees covered under the SCA with the right to seek punitive damages and attorneys' fees for violations of the Act and thus dramatically undermines the balance struck by Congress. Indeed, if the decision below is allowed to stand, employers will not be willing to submit SCA disputes to the Department of Labor because doing so would entail the risk of incurring automatic penalties under the Louisiana statute if liability is

ultimately found.[8] Thus, the Louisiana court's decision is fundamentally inconsistent with and significantly alters the balance struck by Congress under the SCA.[9]

Finally, we note that when confronted with similar attempts to circumvent exclusive remedies established by Congress, this Court has consistently held that such

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[8] The Louisiana statute penalizes employers who fail to pay wages owed discharged employees promptly. The employees are awarded damages for each day (up to 90 days) that they do not receive the unpaid wages. Thus, when a dispute arises under the SCA and is submitted to the Department of Labor for resolution, the employer will automatically be penalized for each day (up to 90 days) that it takes the Department to reach a determination. Here, respondents seek from petitioner damages 24 times greater than those that were awarded by the Department of Labor. Thus, if the state law is not preempted, petitioner will be subject to this automatic penalty merely as a result of adhering to the Act's remedial enforcement procedures. In contrast, employees face no penalty under the Louisiana statute if the employer ultimately prevails.

[9] The court's decision in *Livadas v. Bradshaw*, 512 U.S. 107 (1994), is not inconsistent with the line of cases implicated here. Unlike the Department of Labor under the SCA, the arbitration procedures under the collective bargaining agreement at issue in *Livadas* clearly were not intended to be an exclusive forum for resolving disputes. Indeed, the Court noted that "[n]either party here argues for application of the rule of [*Garmon*]. . . . " *Id.* at 117 n.11. Furthermore, the collective bargaining agreement at issue in the *Livadas* case did not purport to represent an exclusive remedial scheme or source of rights, and thus the California statute at issue there did not disturb a careful balance struck by Congress. Of course, to the extent there is any uncertainty as to the applicability of *Livadas* to what federal courts have uniformly found in the Service Contract Act's exclusive scheme, this is an additional reason why this Court should review the decision below.

claims are preempted. For example, in *Amalgamated Ass'n of Street, Elec. Ry. and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 276 (1971), the Court held that the NLRA "preempts state and federal court jurisdiction to remedy conduct that is arguably protected or prohibited by the Act." In that case, the Court precluded a former member of a labor union from pursuing a claim of improper discharge for membership under state law because such suits would undermine the "comprehensive national labor law, entrusted for its administration and development to a centralized, expert agency. . . . " *Id.* at 286. *See also Allis-Chalmers Corp. v. Lueck*, 471 U.S. at 211 (preempting state law tort action alleging bad faith in handling a disability claim because such suits would undermine the uniformity of federal labor law). Similarly, this Court has rejected attempts to evade the exclusive remedy provided by Congress under the Employee Retirement Income Security Act of 1974 ("ERISA"). *See, e.g., Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 485 (1990). The Court has refused to allow plaintiffs to proceed under state law where such claims would "completely undermine" the "comprehensive civil enforcement scheme" established by Congress. *Id.* The decision below cannot be reconciled with these decisions and should not be allowed to stand for this reason as well.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

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June 19, 1997

THE SUPREME COURT OF THE STATE OF LOUISIANA

LONNIE B. BUTLER, ET AL

VS. NO. 97-C – 0251

FIDELITY TECHNOLOGIES CORPORATION

IN RE: Fidelity Technologies Corp.; – Defendant(s); Applying for Writ of Certiorari and/or Review; Parish of Vernon 30th Judicial District Court Div. "B" Number 55,876A; to the Court of Appeal, Third Circuit, Number CA96-0821.

March 21, 1997

Denied.

JPV
PFC
WFM
HTL
CDK
CDT
JTK

JOHNSON, J. not on panel.

Supreme Court of Louisiana
March 21, 1997

/s/ _____
Clerk of Court
For the Court

THIRD CIRCUIT, COURT OF APPEAL
STATE OF LOUISIANA
NUMBER 96-821

LONNIE B. BUTLER ET AL.

Plaintiffs-Appellants

VERSUS

FIDELITY TECHNOLOGIES CORPORATION

Defendant-Appellee

On Appeal from the Thirtieth Judicial District Court, Parish of Vernon, the Honorable Roy B. Tuck, Jr., District Judge presiding.

Before THIBODEAUX, PETERS, and GREMILLION, Judges.

GREMILLION, Judge.

The plaintiffs, former employees of the defendant, Fidelity Technologies Corporation, appeal the trial court's judgment sustaining Fidelity's exception of lack of subject matter jurisdiction. For the following reasons, we reverse and remand this matter to the trial court for further proceedings.

FACTS

On March 1, 1991, Fidelity entered into a contract with the Seventh Signal Command of the United States Army to provide operation and maintenance services for the administrative telephone system at Ft. Polk, Louisiana. Because the subject matter of the contract is the

provision of services to the Federal Government, it is governed by the mandates of the Service Contract Labor Standards Act (SCA), 41 U.S.C. § 351, which ensures that service employees working on government contracts are paid the prevailing wages paid in the locality by non-governmental contractors. The wage and benefit determinations are made by the Department of Labor under the direction of the Secretary of Labor by surveying the wages for similar jobs in the locality. Fidelity provided the operation and maintenance services from April 1, 1991 until November 4, 1992, when Fidelity novated the contract to Dynamic Concepts, Incorporated (DCI), who then succeeded to all of Fidelity's duties and responsibilities under the contract.

At the time of the novation, the plaintiffs were employees of Fidelity. On November 4, 1992, the date DCI assumed all of Fidelity's responsibilities, they became employees of DCI and on November 5, 1994, they were promptly discharged. At this time, the plaintiffs had accrued unused vacation days and they made timely demand to be paid all wages and benefits due. However, a dispute arose over whom, Fidelity or DCI, was responsible for payment of this vacation time. Fidelity and DCI were unable to negotiate a resolution to this dispute and thereafter submitted their dispute to the United States Department of Labor, Wage and Hour Division, for resolution as required by the SCA. On January 6, 1993, the plaintiffs requested intervention by the Department of Labor in this dispute. The plaintiffs allege that they never received a response to this request.

On December 4, 1994, the plaintiffs instituted the present litigation against Fidelity pursuant to La.R.S.

23:631 and 632. La.R.S. 23:631 provides that upon discharge, the employer has the duty to pay the employee the amount of the wages due under the terms of employment within three days of the discharge. Failure to pay or tender payment subjects the employer to liability in the amount of either ninety days wages at the employee's daily rate or full wages from the time of demand until the employer pays or tenders payment, whichever is the lesser amount. La.R.S. 23:632. In addition, reasonable attorney fees are available to the employee in the event it is necessary to file suit to collect the unpaid wages. *Id.*

On March 14, 1995, Fidelity filed an exception to subject matter jurisdiction alleging that because the contract between it and the Seventh Signal Command incorporated the SCA, state law is preempted and the exclusive remedy available to the plaintiffs is administrative relief through the United States Department of Labor. The hearing on this motion was held on February 23, 1996, wherein the trial court sustained the exception finding that the SCA preempted state law.

ASSIGNMENT OF ERROR

The plaintiffs have appealed alleging that the trial court erred in holding that the Service Contract Act of 1965 preempts a state law claim arising out of an employer's failure to pay its employees all amounts due within seventy-two hours of termination.

PREEMPTION

The United States Supreme Court clearly set forth the standard for federal preemption under the Supremacy Clause of the United States Constitution in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 2617 (1992):

> Article VI of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Thus, since our decision in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427, 4 L.Ed. 579 (1819), it has been settled that state law that conflicts with federal law is "without effect." Consideration of issues arising under the Supremacy Clause "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." Accordingly, " '[t]he purpose of Congress is the ultimate touchstone' " of preemption analysis.
>
> Congress' intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field " 'as to make reasonable the inference that Congress left no room for the States to supplement it.' "

(citations omitted).

"Preemption is not to be presumed lightly. In fact, there is typically a presumption weighing against preemption to insure that neither the Congress nor the courts unintentionally or unnecessarily disturb the federal-state balance." *Huntleigh Corp. v. Louisiana State Board of Private Security Examiners,* 906 F.Supp. 357, 360 (M.D. La. 1995). The historic police powers of the states are not to be superseded by federal acts unless it is the clear and manifest purpose of Congress. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 67 S.Ct. 1146 (1947). To determine whether a state statute is preempted by federal statute, the court must first determine the construction of the two statutes and then resolve the question of whether the state statute interferes with the accomplishment and execution of the full purposes and objectives of Congress. *Tenneco, Inc. v. Sutton,* 530 F.Supp. 411 (M.D. La. 1981). "Thus, where a state and the Congress enact similar legislation, the Court must review the history and purpose of the federal regulation to determine whether the Congress intended to pre-empt the state legislation and regulate the area in question." *Id.* at 433, 434.

DISCUSSION

Fidelity argues that the courts do not have jurisdiction over this action because the plaintiffs' exclusive remedy for non-payment is the administrative remedy provided by the SCA and the regulations enacted pursuant to that Act. We disagree. The SCA does not explicitly nor implicitly address the issue of non-payment. The Revision Notes and Legislative Reports of the SCA provides that "[t]he purpose of this bill is to provide labor standards for the protection of employees of contractors

and subcontractors furnishing services to or performing maintenance service for Federal Agencies." From a reading of the SCA and the historical notes, one finds that the main thrust of the act is to ensure that employees of contractors or subcontractors furnishing services for Federal Agencies are paid no less than the prevailing rate in the locality, including fringe benefits, and that the work will not be performed under unsafe or unsanitary conditions.[1] If the employer fails to provide such, the Federal

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[1] § 351. Required contract provisions: minimum wages

(a) Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of $2,500 except as provided in section 356 of this title, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees, shall contain the following:

(1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary, or his authorized representative, in accordance with prevailing rates for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's-length negotiations. In no case shall such wages be lower than the minimum specified in subsection (b) of this section.

(2) A provision specifying the fringe benefits to be furnished the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, to be provided for in such agreement, including prospective fringe benefit increases provided for in such

Agency may withhold payment under the contract; sue to recover underpayments; cancel the contract; and prohibit the offending firm from receiving further contracts with the Federal Agency for up to three years.[2]

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agreement as a result of arm's-length negotiations. Such fringe benefits shall include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor. The obligation under this subparagraph may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary.

(3) A provision that no part of the services covered by this chapter will be performed in buildings or surroundings or under working conditions, provided by or under the control or supervision of the contractor or any subcontractor, which are unsanitary or hazardous or dangerous to the health or safety of service employees engaged to furnish the services.

41 USCA § 351 (1996).

[2] 41 USCA §§ 352-354 (1996) provide the following:

§ 352. Violations

(a) Liability of responsible party; withholding payments due on contract; payment of underpaid employees from withheld payments

Any violation of any of the contract stipulations required by section 351(a)(1) or (2) or of section 351(b) of this title shall render the party responsible therefor liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contract. So much of the accrued

In their complaint, the plaintiffs do not allege that the employment contract with Fidelity fails to comply with

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payment due on the contract or any other contract between the same contractor and the Federal Government may be withheld as is necessary to pay such employees. Such withheld sums shall be held in a deposit fund. On order of the Secretary, any compensation which the head of the Federal agency or the Secretary has found to be due pursuant to this chapter shall be paid directly to the underpaid employees from any accrued payments withheld under this chapter.

(b) Enforcement of section

In accordance with regulations prescribed pursuant to section 353 of this title, the Federal agency head or the Secretary is hereby authorized to carry out the provisions of this section.

(c) Cancellation of contract: contracts for completion of original contract; liability of original contractor for additional cost

In addition, when a violation is found of any contract stipulation, the contract is subject upon written notice to cancellation by the contracting agency. Whereupon, the United States may enter into other contracts or arrangements for the completion of the original contract, charging any additional cost to the original contractor.

§ 353. Law governing authority of Secretary

(a) Enforcement of chapter

Sections 38 and 39 of this title shall govern the Secretary's authority to enforce this chapter, make rules, regulations, issue orders, hold hearings, and make decisions based upon findings of fact and take other appropriate action hereunder.

(b) Limitations and regulations allowing variations, tolerances, and exemptions

The Secretary may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this chapter (other than section 358 of this title), but only in special circumstances where he determines that such limitation,

the wage and benefit requirements of the SCA. What they do allege, however, is that they were not paid these

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variation, tolerance, or exemption is necessary and proper in the public interest or to avoid the serious impairment of government business, and is in accord with the remedial purpose of this chapter to protect prevailing labor standards.

(c) Predecessor contracts; employees wages and fringe benefits

No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: *Provided*, That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.

(d) Duration of contract

Subject to limitations in annual appropriation Acts but notwithstanding any other provision of law, contracts to which this chapter applies may, if authorized by the Secretary, be for any term of years not exceeding five, if each such contract provides for the periodic adjustment of wages and fringe benefits pursuant to future determinations, issued in the manner prescribed in section 351 of this title no less often than once every two years during the term of the contract, covering the various classes of service employees.

§ 354. List of violators; prohibition of contract award to firms appearing on list; actions to recover underpayments; payment of sums recovered

benefits and they sought recourse under La.R.S. 23:631 and 632.

The purpose of La.R.S. 23:631 and 632 is to compel the employer to pay the earned wages of an employee promptly after his dismissal or resignation. In contrast, the SCA's purpose and objective is to ensure that federal service contract employees are treated equally with

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(a) The Comptroller General is directed to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary have found to have violated this chapter. Unless the Secretary otherwise recommends because of unusual circumstances, no contract of the United States shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until three years have elapsed from the date of publication of the list containing the name of such persons or firms. Where the Secretary does not otherwise recommend because of unusual circumstances, he shall, not later than ninety days after a hearing examiner has made a finding of a violation of this chapter, forward to the Comptroller General the name of the individual or firm found to have violated the provisions of this chapter.

(b) If the accrued payments withheld under the terms of the contract are insufficient to reimburse all service employees with respect to whom there has been a failure to pay the compensation required pursuant to this chapter, the United States may bring action against the contractor, subcontractor, or any sureties in any court of competent jurisdiction to recover the remaining amount of underpayments. Any sums thus recovered by the United States shall be held in the deposit fund and shall be paid, on order of the Secretary, directly to the underpaid employee or employees. Any sum not paid to an employee because of inability to do so within three years shall be covered into the Treasury of the United States as miscellaneous receipts.

employees in that locality by requiring the contractor to pay the prevailing wage and benefits. La.R.S. 23:631 and 632 do not prevent or interfere with the attainment of these federal goals. In fact, 23:631 and 632 help to effectuate the SCA. Depriving Louisiana employees of this remedy would be inconsistent with the objectives of the SCA when the SCA seeks to ensure that these same employees are guaranteed the same benefits as other employees in the same locality and state. As such we find that the SCA does not preempt La.R.S. 23:631 and 632 and reverse the judgment of the trial court.

CONCLUSION

The judgment of the trial court sustaining Fidelity Technologies Corporation's Declinatory Exception of Lack of Subject Matter Jurisdiction is reversed and this matter is remanded to the trial court for further proceedings. The costs of this appeal are assessed against Fidelity Technologies Corporation.

REVERSED AND REMANDED.

* * *

[p. 17] Opinion of the Thirtieth Judicial District Court of Louisiana

BY THE COURT:

Very well. I'm going to note that the facts in this matter as I understand them are simply these, that the defendant, Fidelity Technologies Corporation entered into a contract with the United States Government, particularly the United States Army, for the purposes, primarily, without detailing the contract, of providing services for, that is repairs and maintenance and operation of a telephone system, an administrative telephone system owned by the United States Government, that is by the United States Army at Fort Polk. It really has nothing to do with this matter, they, likewise, entered into a contract to service and operate some facilities owned by the Government at other locations other than Fort Polk. My further understanding of the facts are that they began performance under the terms of that contract on or about April 1, 1991 and they continued to perform under that contract for some period of time. The persons who are plaintiffs in this lawsuit were employees of that defendant and Fidelity Technologies Corporation and primarily most of them, I believe, worked throughout the period of time from roughly April until some time in November of 1992. It appears that after this matter had begun that Fidelity Technologies Corporation determined that they were not making a profit, in other words, that they were not able to carry on and continue to perform this service profitably and they began to seek some manner in which to relieve themselves of the obligations they assumed

under the terms of that contract. They did this by way of a novation. Under the terms of the novation, [p. 18] that is an agreement entered into by Fidelity Technologies Corporation, Dynamic Concepts, Inc. and the United States Government, they transferred their interest in this contract to Dynamic Concepts, Inc. The act of novation provides that the transfer would be effective as of November 1, 1992. It makes the further provision that as of November 1, 1992, the transferor, and the transferor in this case would be Fidelity Technologies Corporation, has transferred to the transferee, who would be Dynamic Concepts, Inc., contract and the number is then spelled out of the transferor by virtue of a novation agreemént between the transferor and the transferee. The further provision is made that, and this is in paragraph 3 in the beginning of the novation, that the transferee has acquired all rights to the contract of the transferor by virtue of the above transfer. In 4 it's provided that the transferee, Dynamic Concepts, Inc., has assumed all obligations and liabilities of the transferor under the contract by virtue of the above transfer. It appears that this novation was executed by and between the parties on or about October 30, 1992, that Dynamic Concepts, Inc. did, in truth and in fact, commence the operation but that Fidelity Technologies Corporation continued until about November 4 in getting the transfer and the logistics of the transfer worked out. As of that time and the evidence before me does not make quite clear, I assume from pleadings and from other information that I find in the record that some of these employees, a good number of them, continued to work for Dynamic Concepts, Inc. In

other words, their employment with Fidelity Technologies Corporation ended and their employment with Dynamic Concepts, Inc. began. The evidence would appear clearly to establish that there was never any break in their employment, there was never any break in their pay. The dispute that arose in this case was who, as between Fidelity Technologies Corporation and Dynamic Concepts, Inc., was [p. 19] responsible for unused, unpaid for vacation time that had accrued prior to these persons being placed on the payroll of Dynamic Concepts, Inc. I'm not sure if I had looked, as counsel, at the terms of the novation that I would not have referred to 4 and said that the transferee has assumed all obligations and liabilities of the transferor under the contract by virtue of the above transfer. I'm not sure that I would have said that nor that I wouldn't have said that. Be that as it may, certainly it is reasonable to construe that provision as, at least, implying that Dynamic Concepts, Inc. had assumed whatever obligations may have arisen under the terms of this contract on the part of Fidelity Technologies Corporation. And, of course, it would include the responsibility for making certain that employees were compensated. Be that as it may, it develops that what happened was that this matter was referred to the Department of Labor. The Department of Labor ultimately determined that Fidelity, in truth and in fact, was responsible for paying the vacation pay. Now, this was not introduced in evidence this afternoon, but, it's the – the record is replete with this and I believe that it's fair to indicate that Fidelity at some time, not immediately, but, at some time subsequent to being informed of this determination, in truth and in fact, tendered on a date in March of 1995, March 1 or March 5,

I've forgotten the date now, tendered the vacation pay that had not been paid. I do not have before me a ruling – a determination date to determine what took place, but, be that as it may, that tender was made after that determination was made. This suit was filed under the provisions of Title 23 Section 631 and 632 of the Louisiana Revised Statutes seeking to recover the alleged vacation pay due with penalties and attorney's fees. The penalties and attorney's fees apparently not having been allowed, not being permissible under the determinations by the Department of Labor, but, being [p. 20] provided for under the Louisiana Statue. The exception filed herein is one that says that under the Services Contract Act these matters are governed and are reposed entirely within the Department of Labor and that this court lacks jurisdiction to apply the Louisiana law to this particular dispute. I note, and, I'm referring particularly to the *Danielsen* case which is reported at 746 F.Supp. 170 and I'm referring particularly to language contained on page 175 of that decision where it's said, the purpose of the SCA, that is the Service Contract Act and I added that, was to ensure that service employees working on Government contracts are not paid wages below the prevailing wages being paid in the locality by non-government contractors. Thus, Section 2 of the Act requires the inclusion of specific provisions establishing minimum wage and fringe benefit levels in contracts entered into by the United States in excess of twenty-five hundred dollars. The principle purpose of which is to furnish services in the United States through the use of service employees. As I consider the facts in this case, I'm of the opinion that the specific purpose of the contract entered into initially by Fidelity

was to furnish services in the United States through the use of service employees, that is, employees to operate and service the administrative telephone system owned by the Untied States Government at Fort Polk. So, I believe to that extent we come within those provisions. The next question arises, is the Services Contract Act limited to wage levels only. The court is of the opinion that the language indicates that it is not so limited and that it includes fringe benefits and that the payment of vacation time is, in truth and in fact, fringe benefits. We then find that the wage and fringe benefit determination is specifically directed to the responsibility of the Secretary of Labor in accordance with prevailing rates for such employees in the locality. In short, I do not agree with a [p. 21] system that would appear to deprive litigants of a right to access to the courts. Nevertheless, I believe that is precisely what the Congress has attempted to do in this case by according exclusive jurisdiction in the Department of Labor to make these determinations. I do not believe, under those circumstances, that it's appropriate for this court to undertake to make that determination applying the law of the State of Louisiana as opposed to applying the determinations made by the Department of Labor both as to the prevailing rates and fringe benefits which would be due and as to compliance with the obligation imposed to pay the wages and fringe benefits which would be due. I do not necessarily like the decision that I am making, be that as it may, I believe that the exception is good under those circumstances and I'm going to maintain the exception and hold that this court has no jurisdiction to adjudicate this particular matter. Gentlemen, do

you understand what I have said? I'm not sure anybody else will.

LONNIE B. BUTLER, AUDREY M. ANDERSON, ROBERT H. ARMER, W. L. BASCO, JR., LINDA KAY BEHAN, JAMES W. BRYANT, LOYIL W. CRYER, WAYNE DUNN, KARAN M. MAHLEN, JOSEPH T. MARTIN, MARGARET H. MAYO, FRANCES R. MELCHIORRI, DONALD R. SAVANT, RAMONA SMART, AND HAROLD D. STAPLES	)	NUMBER 55,876A
VERSUS	)	(Filed Mar. 4, 1996)
FIDELITY TECHNOLOGIES CORPORATION	)	VERNON PARISH, LOUISIANA

JUDGMENT

Fidelity Technologies Corporation's declinatory exception of lack of subject matter jurisdiction came on for hearing before this Court on Friday, February 23, 1996. Counsel for all parties were present. Having reviewed the evidence presented and considered the law and argument presented by counsel for plaintiffs and defendant, for reasons orally assigned in open court on Friday, February 23, 1996:

IT IS HEREBY ORDERED, ADJUDGED and **DECREED** that defendant's declinatory exception of lack of subject matter jurisdiction be and the same hereby is **GRANTED** and plaintiffs' petition is dismissed, at plaintiffs' cost, for lack of subject matter jurisdiction.

THUS DONE and SIGNED this 5th day of March, 1996.

/s/ Roy B. Tuck
ROY B. TUCK
DISTRICT JUDGE

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ATTORNEYS FOR PLAINTIFFS

41 U.S.C. § 351. Required contract provisions; minimum wages

(a) Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of $2,500, except as provided in section 356 of this title, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees, shall contain the following:

> **(1)** A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder as determined by the Secretary, or his authorized representative, in accordance with prevailing rates for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's-length negotiations. In no case shall such wages be lower than the minimum specified in subsection (b) of this section.
>
> **(2)** A provision specifying the fringe benefits to be furnished the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, to be provided for in such agreement, including prospective fringe benefit increases provided for

in such agreement as a result of arm's-length negotiations. Such fringe benefits shall include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor. The obligation under this subparagraph may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary.

* * *

(b)(1) No contractor who enters into any contract with the Federal Government the principal purpose of which is to furnish services through the use of service employees and no subcontractor thereunder shall pay any of his employees engaged in performing work on such contracts less than the minimum wage specified under section 206(a)(1) of Title 29.

* * *

41 U.S.C. § 352. Violations

(a) Liability of responsible party; withholding payments due on contract; payment of underpaid employees from withheld payments

Any violation of any of the contract stipulations required by section 351(a)(1) or (2) or of section 351(b) of this title shall render the party responsible therefor liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contract. So much of the accrued payment due on the contract or any other contract between the same contractor and the Federal Government may be withheld as is necessary to pay such employees. Such withheld sums shall be held in a deposit fund. On order of the Secretary, any compensation which the head of the Federal agency or the Secretary has found to be due pursuant to this chapter shall be paid directly to the underpaid employees from any accrued payments withheld under this chapter.

(b) Enforcement of section

In accordance with regulations prescribed pursuant to section 353 of this title, the Federal agency head or the Secretary is hereby authorized to carry out the provisions of this section.

(c) Cancellation of contract; contracts for completion of original contract; liability of original contractor for additional cost

In addition, when a violation is found of any contract stipulation, the contract is subject upon written notice to cancellation by the contracting agency. Whereupon, the United States may enter into other contracts or arrangements for the completion of the original contract, charging any additional cost to the original contractor.

* * *

41 U.S.C. § 354. List of violators; prohibition of contract award to firms appearing on list; actions to recover underpayments; payment of sums recovered

(b) If the accrued payments withheld under the terms of the contract are insufficient to reimburse all service employees with respect to whom there has been a failure to pay the compensation required pursuant to this chapter, the United States may bring action against the contractor, subcontractor, or any sureties in any court of competent jurisdiction to recover the remaining amount of underpayments. Any sums thus recovered by the United States shall be held in the deposit fund and shall be paid, on order of the Secretary, directly to the underpaid employee or employees. Any sum not paid to an employee because of inability to do so within three years shall be covered into the Treasury of the United States as miscellaneous receipts.

29 C.F.R. § 4.187 Recovery of underpayments.

(a) The Act, in section 3(a), provides that any violations of any of the contract stipulations required by sections 2(a)(1), 2(a)(2), or 2(b) of the Act, shall render the party responsible liable for the amount of any deductions, rebates, refunds, or underpayments (which includes non-payment) of compensation due to any employee engaged in the performance of the contract. So much of the accrued payments due either on the contract or on any other contract (whether subject to the Service Contract Act or not) between the same contractor and the Government may be withheld in a deposit fund as is necessary to pay the employees. In the case of requirements-type contracts, it is the contracting agency, and not the using agencies, which has the responsibility for complying with a withholding request by the Secretary or authorized representative. The Act further provides that on order of the Secretary (or authorized representatives), any compensation which the head of the Federal agency or the Secretary has found to be due shall be paid directly to the underpaid employees from any accrued payments withheld. In order to effectuate the efficient administration of this provision of the Act, such withheld funds shall be transferred to the Department of Labor for disbursement to the underpaid employees on order of the Secretary or his or her authorized representatives, an Administrative Law Judge, or the Administrative Review Board, and are not paid directly to such employees by the contracting agency without the express prior consent of the Department of Labor.

* * *

(c) Section 5(b) of the Act provides that if the accrued payments withheld under the terms of the contract are insufficient to reimburse all service employees with respect to whom there has been a failure to pay the compensation required pursuant to the Act, the United States may bring action against the contractor, subcontractor, or any sureties in any court of competent jurisdiction to recover the remaining amount of underpayments. The Service Contract Act is not subject to the statute of limitations in the Portal to Portal Act, 29 U.S.C. 255, and contains no prescribed period within which such an action must be instituted; it has therefore been held that the general period of six years prescribed by 28 U.S.C. 2415 applies to such actions, United States of America v. Deluxe Cleaners and Laundry, Inc., 511 F.2d 929 (C.A. 4, 1975). Any sums thus recovered by the United States shall be held in the deposit fund and shall be paid, on the order of the Secretary, directly to the underpaid employees. Any sum not paid to an employee because of inability to do so within 3 years shall be covered into the Treasury of the United States as miscellaneous receipts.

* * *

29 C.F.R. § 4.191 Complaints and compliance assistance.

(a) Any employer, employee, labor or trade organization, contracting agency, or other interested person or organization may report to any office of the Wage and Hour Division (or to any office of the Occupational Safety and Health Administration, in instances involving the safety and health provisions), a violation, or apparent

violation of the Act, or of any of the rules or regulations prescribed thereunder.

* * *

§ 631. Discharge or resignation of employees; payment after termination of employment

A. (1)(a) Upon the discharge of any laborer or other employee of any kind whatever, it shall be the duty of the person employing such laborer or other employee to pay the amount then due under the terms of employment, whether the employment is by the hour, day, week, or month, nor later than three days following the date of discharge.

(b) Upon the resignation of any laborer or other employee of any kind whatever, it shall be the duty of the person employing such laborer or other employee to pay the amount then due under the terms of employment, whether the employment is by the hour, day, week, or month, on or before the next regular payday or no later than fifteen days following the date of resignation, whichever occurs first.

(2) Payment shall be made at the place and in the manner which has been customary during the employment, except that payment may be made via United States mail to the laborer or other employee, provided postage has been prepaid and the envelope properly addressed with the employee's or laborer's current address as shown in the employer's records. In the event payment is made by mail the employer shall be deemed to have made such payment when it is mailed. The timeliness of the mailing may be shown by an official United States postmark or other official documentation from the United States Postal Service.

(3) The provisions of this Subsection shall not apply when there is a collective bargaining agreement between

the employer and the laborer or other employee which provides otherwise.

B. In the event of a dispute as to the amount due under this Section, the employer shall pay the undisputed portion of the amount due as provided for in Subsection A of this Section. The employee shall have the right to file an action to enforce such a wage claim and proceed pursuant to Code of Civil Procedure Article 2592.

C. With respect to interstate common carriers by rail, a legal holiday shall not be considered in computing the three day period provided for in Subsection A of this Section.

§ 632. Liability of employer for failure to pay; attorney fees

Any employer who fails or refuses to comply with the provisions of R.S. 23:631 shall be liable to the employee either for ninety days wages at the employee's daily rate of pay, or else for full wages from the time the employee's demand for payment is made until the employer shall pay or tender the amount of unpaid wages due to such employee, whichever is the lesser amount of penalty wages. Reasonable attorney fees shall be allowed the laborer or employee by the court which shall be taxed as costs to be paid by the employer, in the event a well-founded suit for any unpaid wages whatsoever be filed by the laborer or employee after three days shall have elapsed from time of making the first demand following discharge or resignation.

06 January 1993

Mr. Don Ferguson
U.S. Dept of Labor
Wage & Hour Division
3732 Government
Alexandria, LA 71309

Dear Mr. Ferguson:

Enclosed please find a formal complaint filed by the former manager and employees of Fidelity Technologies Inc regarding earned vacation time denied to us by above company.

Thank you for your time.

Sincerely, /s/ Donald Savant
Former FTC Employees

cc: Senator James David Cain
Senator John Breaux
Congressman Jim McCreary

Supreme Court, U.S.
FILED
JUL 16 1997
CLERK

(2)

No. 96-2015

In The

Supreme Court of the United States

October Term, 1996

FIDELITY TECHNOLOGIES CORPORATION,

Petitioner,

v.

LONNIE B. BUTLER, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Louisiana Third Circuit Court Of Appeal

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

PROCEEDINGS BELOW

On behalf of LONNIE B. BUTLER, AUDREY M. ANDERSON, ROBERT H. ARMER, W. L. BASCO, JR., LINDA KAY BEHAN, JAMES W. BRYANT, LOYIL W. CRYER, WAYNE DUNN, KARAN M. MAHLEN, JOSEPH T. MARTIN, MARGARET H. MAYO, FRANCES R. MELCHIORRI, DONALD R. SAVANT, RAMONA SMART, HAROLD D. STAPLES, and RUBY LEA HUTSON, counsel instituted this lawsuit on or about December 8, 1994. (App. 1-5). As alleged, Fidelity Technologies Corporation (hereinafter sometimes referred to as "Fidelity Technologies" or "petitioner"), failed to pay vacation benefits due former employees within seventy-two hours of their termination on November 5, 1992, notwithstanding amicable demand for same. In fact, Fidelity Technologies admitted in the district court proceedings that no amount was ever tendered to respondents until months after this suit was filed, years after the debt was due. (App. 23-24). The ostensible reason for the failure to tender amounts due was because the former employer was in a dispute with another company regarding which company would pay respondents the accrued benefits – the employer who terminated the employees, Fidelity Technologies, Inc., or the company to whom Fidelity assigned a contract, Dynamic Concepts, Inc. (App. 19).

Petitioner filed an exception to the subject matter jurisdiction contending, as the company president stated on the witness stand, that the United States Department of Labor was the only entity that could "legally force us" to pay. (App. 20). On February 23, 1996, a hearing on the

exception to the subject matter jurisdiction of the state court was heard. The district judge sustained the exception. An appeal ensued. On December 26, 1996, the Third Circuit Court of Appeal, reversed the trial court ruling holding that state court has jurisdiction to address respondents' claims asserted pursuant to state wage laws that require an employer to pay wages, including wage benefits, within seventy-two hours of termination. As the Third Circuit stated:

> "The purpose of LSA-R.S. 23:631 and 632 is to compel the employer to pay the earned wages of an employee promptly after his dismissal or resignation. In contrast, the SCA's purpose and objective is to ensure that federal service contract employees are treated equally with employees in that locality by requiring the contractor to pay the prevailing wage and benefits. La.R.S. 23:631 and 632 do not prevent or interfere with the attainment of these federal goals. In fact, 23:631 and 632 help to effectuate the SCA. Depriving Louisiana employees of this remedy would be inconsistent with the objectives of the SCA when the SCA seeks to ensure that these same employees are guaranteed the same benefits as other employees in the same locality and state. As such we find that the SCA does not preempt La.R.S. 23:631 and 632 and reverse the judgment of the trial court."

The Louisiana Supreme Court voted unanimously to deny petitioner's writ application.

STATEMENT OF FACTS

The sixteen respondents are all former employees of Fidelity Technologies whose employment with the petitioner was terminated on or about November 5, 1992. On November 1, 1992, a novation agreement dated October 30, 1992, between petitioner and Dynamic Concepts, Inc. went into effect whereby Dynamic Concepts, Inc. assumed the obligation to operate and maintain the administrative telephone system located at Fort Polk previously operated by Fidelity Technologies Corporation. The respondents were not paid their accrued vacation benefits upon termination. Mr. Gulati, President of Fidelity Technologies, testified on direct examination as follows:

> Q. "Did you have dispute develop over who owed vacation pay to the people that had been employed by you but began working for D.C.I. at the novation?"
>
> A. "Yes, we did."
>
> Q. "What was the dispute about?"
>
> A. Dispute was which of our companies was responsible for paying the vacation pay which was accrued before the novation transfer. (App. 19).

Counsel for respondents strenuously objected to the trial court allowing parol testimony about the substance of any purported "ruling" by the Department of Labor on the grounds that such "ruling" itself would be the best evidence of its content; that such testimony was hearsay and that it also lacked an adequate foundation. In any event, the dispute before the court was the dispute

between the petitioner and its former employees, not the dispute between Fidelity and Dynamic Concepts.

The petitioner chose to shirk its employment obligation until such time as an extraneous dispute with another party could be resolved. Mr. Gulati testified that, by pure happenstance, a "ruling" on the Fidelity/ Dynamic dispute occurred within a few days after service of the lawsuit now before this court. (App. 22). This suit was filed more than two years after the obligation of petitioner to pay the benefits arose. Not until three months after the Department of Labor "ruling" did Fidelity tender any monies at all, which tender did not include interest, penalties, or attorney fees. (App. 23-24).

REASONS FOR DENYING THE WRIT

I. Whether Louisiana courts retain subject matter jurisdiction over state wage law claims asserted pursuant to LSA-R.S. 23:631 and 632 in light of the presumption that such laws are not preempted by federal legislation.

After the passage of more than two years without receiving the vacation benefits to which respondents were entitled upon termination of employment, respondents filed this lawsuit in state court asserting the rights and remedies afforded by state law under LSA-R.S. 23:631 and 632. LSA-R.S. 23:631 provides in pertinent part:

> "Upon the discharge of any laborer or other employee of any kind whatever, it shall be the duty of the person employing such laborer or

> other employee to pay the amount then due under the terms of employment, whether the employment is by the hour, day, week, or month, not later than three days following the date of discharge."

LSA-R.S. 23:632 provides in pertinent part:

> "Any employer who fails or refuses to comply with the provisions of R.S. 23:631 shall be liable to the employee either for ninety days wages at the employee's daily rate of pay, or else for full wages from the time the employee's demand for payment is made until the employer shall pay or tender the amount of unpaid wages due to such employee, whichever is the lesser amount of penalty wages. Reasonable attorney fees shall be allowed the laborer or employee by the court which shall be taxed as costs to be paid by the employer, in the event a well-founded suit for any unpaid wages whatsoever be filed by the laborer or employee after three days shall have elapsed from time of making first demand following discharge or resignation."

With only minor modifications, these wage statutes have been the law in Louisiana since 1920. Louisiana courts have held that vacation benefits are considered an "amount . . . due under the terms of employment" within the meaning of these wage statutes. *Stell v. Caylor,* 223 So.2d 423, 426 (La. App. 3rd Cir. 1969). See also *Berteau v. Wiener Corp.,* 362 So.2d 806 (La. App. 4th Cir. 1978); *Lee v. Katz and Bestoff, Inc.,* 479 So.2d 459 (La. App. 1st Cir. 1985); *Potvin v. Wright's Sound Gallery, Inc.,* 568 So.2d 623 (La. App. 2nd Cir. 1990)

In *Stafford v. City of Baton Rouge,* 403 So.2d 733, 734 (La. 1981), the Louisiana Supreme Court held that

" . . . the requirements of R.S. 23:631, *et seq.*, pertaining to the duty of an employer to pay wages due to an employee upon discharge or resignation . . . apply equally to both private and governmental employers." The Court further stated:

> "The employees of governmental agencies need their wages upon cessation of employment just as urgently as the employees of individuals or of private corporations. Furthermore, the Legislature, although expressly recognizing this special need of all employees to receive wages due him immediately upon discharge or termination, has not seen fit to distinguish between governmental and private employers in imposing the obligation upon employers to pay immediately the wages due upon cessation of employment. We decline to imply that the Legislature intended such a distinction, and we have not been shown any rational basis for a constitutional classification if the Legislature did intend to distinguish between employers." *Stafford*, 403 So.2d at 734

It is axiomatic that states have the right to adopt such wage laws in the exercise of their police power, that is, " . . . the inherent power of the state to govern persons and things, within constitutional limits, for the promotion of general security, health, morals and welfare." *Francis v. Morial*, 455 So.2d 1168, 1172 (La. 1984); *La. Associated Gen. Contr. v. Calcasieu*, 586 So.2d 1354, 1366 (La. 1991); *Moore v. RLCC Technologies, Inc.*, 668 So.2d 1135, 1143 at note 11 (La. 1996); *Ruby v. City of Shreveport*, 427 So.2d 1267, 1271 (La. App. 2d Cir. 1983). These particular state laws were first enacted because of " . . . an evil practice then

prevailing among some employers of forcing a discharged laborer to wait until pay day, or longer, to receive the wages he had earned." *Elliott v. General Gas Corporation*, 85 So.2d 55, 57 (La. 1955)

In analyzing whether the state wage laws, adopted to protect Louisiana workers, are preempted by federal law, Courts must start first with the presumption that " . . . the historic police powers of the states [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Allen v. Pennco Engineering Co.*, 847 F.Supp. 1315, 1318 (M.D. La. 1994) quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 2617, 120 L. Ed. 2d 407 (1992). The court in the *Allen* case succinctly summarizes the only instances in which state law is preempted under the Supremacy Clause of the United States Constitution as follows:

> "Courts recognize three circumstances in which state law is preempted under the Supremacy Clause. A federal statute may contain a provision which states that it expressly supersedes state authority. In the absence of such explicit language, state law may be displaced when Congressional regulation is so comprehensive that it is said to have completely occupied an entire field, leaving no room for state law. Preemption may also occur when and to the 'extent that state and federal law actually conflict'." *Allen*, 847 F.Supp. at 1318, citing *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 605, 115 L. Ed. 2d 532, 111 S.Ct. 2476.

It is within this legal framework, that the Third Circuit, Court of Appeal considered and rejected the contention that state law is wholly preempted by the Service Contract Act.

II. Whether the presumption against preemption of a state law, enacted for the welfare of state citizens pursuant to the state's police power, is overcome by any express provision in the Service Contract Act of 1965.

The SCA provides that:

> "[e]very contract . . . entered into by the United States . . . in excess of $2,500 . . . the principal purpose of which is to furnish services in the United States through the use of service employees, shall contain . . . (1) A provision specifying the minimum monetary wages to be paid the various classes of service employees . . . as determined by the Secretary . . . in accordance with the rates for such employees in the locality. . . . (2) A provision specifying the fringe benefits to be furnished the various classes of service employees as determined by the Secretary [including] vacation and holiday pay . . . ". 41 U.S.C.A. § 351(a)

Reference to the Service Contract Act, 41 U.S.C. 351 *et seq.* will show that there is no express provision stating that this federal law supersedes state law regulation of the employment relationship. Therefore, the present case may readily be focused more narrowly on whether a conflict between federal and state law exists requiring displacement of state law, or whether the Congressional

regulation is so comprehensive that it completely occupies the entire field leaving no room for state law. To consider these issues, the Third Circuit, Court of Appeal, correctly considered not only the purpose of the state laws, as stated above, but also the purpose of the federal legislation which petitioner would apply.

III. The purpose for which the Service Contract Act of 1965 was enacted was to assure that employees working for a private contractor performing work for the federal government were paid the prevailing wage rate in the locality of the work.

The Service Contract Act is, in short, a prevailing rate wage law. The reason for the Act is stated in the Legislative History as follows:

> The need for this legislation is well stated in the report issued by the House Education and Labor Committee on September 1, 1965 (H.Rept.No. 948), as follows:
>
> > Many of the employees performing work on Federal service contracts are poorly paid. The work is generally manual work and in addition to craftwork, may be semiskilled or unskilled. Types of service contracts which the bill covers are varied and include laundry and drycleaning, custodial and janitorial, guard service, packing and crating, food service, and miscellaneous housekeeping services.
> >
> > Service employees in many instances are not covered by the Fair Labor Standards Act or State minimum wage laws. The counterpart of these employees in Federal service,

blue-collar workers, are by a Presidential directive assured of at least the Fair Labor Standards Act minimum. Bureau of Labor Statistics surveys of average earnings in service occupations in selected areas in 1961 and 1962 show, however, that an extremely depressed wage level may prevail in private service employment. In contract cleaning services, for example, in some areas less than $1.05 an hour was paid. Elevator operators earned low rates, varying from $0.79 to $1.17 an hour. Service contract employees are often not members of unions. They are one of the most disadvantaged groups of our workers and little hope exists for an improvement of their position without some positive action to raise their wage levels.

The Federal Government has added responsibility in this area because of the legal requirement that contracts be awarded to the lowest responsible bidder. Since labor costs are the predominant factor in most service contracts, the odds on making a successful low bid for a contract are heavily stacked in favor of the contractor paying the lowest wage. Contractors who wish to maintain an enlightened wage policy may find it almost impossible to compete for Government service contracts with those who pay wages to their employees at or below the subsistence level. When a Government contract is awarded to a service contractor with low wage standards, the Government is in effect subsidizing subminimum wages.

As the historical and statutory notes of the SCA state:

> "The purpose of this bill is to provide labor standards for the protection of employees of contractors and subcontractors furnishing services to or performing maintenance service for Federal agencies. The service contract is the only remaining category of Federal contracts to which no labor standards protection applies. Federal construction contracts require compliance with labor standards under the Davis-Bacon Act and related statutes. Federal supply contracts also provide labor standards under the Walsh-Healy Public Contracts Act."
>
> * * *
>
> "Persons covered by the bill must be paid no less than the prevailing rate in the locality as determined by the Secretary, including fringe benefits as an element of the wages. . . . In determining the prevailing rate in the locality, the Secretary will consider the compensation paid persons engaged in such service-work and work of a similar type in the locality." See Historical and Statutory Notes 1965 Act 41 U.S.C.A. § 351.

This legislative history indicates that Congress enacted this legislation for the very same reasons Congress had previously enacted legislation relating to federal construction contracts, namely, to assure a prevailing wage rate. In *Universities Research Ass'n v. Coutu*, 101 S.Ct. 1451, 1463, 450 U.S. 754, 773, 67 L. Ed. 2d 662 (1981), this Honorable Court extensively reviews the legislative history of the Davis-Bacon Act and states as follows:

"[T]he Davis-Bacon Act . . . was 'designed to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area.' [citations omitted] Passage of the Act was spurred by the economic conditions of the early 1930s, which gave rise to an oversupply of labor and increased the importance of federal building programs, since private construction was limited. [citations omitted] In the words of Representative Bacon, the Act was intended to combat the practice of 'certain itinerant irresponsible contractors, with itinerant, cheap, bootleg labor, [who] have been going around throughout the country "picking" off a contract here and a contract there.' The purpose of the bill was 'simply to give local labor and the local contractor a fair opportunity to participate in this building program.' 74 Cong.Rec. 6510 (1931).

As originally enacted . . . the Act required that every federal contract in excess of $5,000 in amount for 'construction, alteration, and/or repair of any public buildings' contain a provision stating that the rate of wages paid laborers and mechanics would not be less than the prevailing rate for similar work in the locality; the Act further required that every contract contain a provision stating that disputes as to what the prevailing wage was on any given project were to be conclusively determined by the Secretary if the contracting officer was unable to resolve the controversy. The original Act thus did not provide for predetermination of prevailing wages by the Secretary; it also did not establish any enforcement mechanism.

> Congress soon concluded, however, that the Act as originally drafted was inadequate. Discontent focused on the lack of effective enforcement provisions and the 'postdetermination' of the prevailing wage. [citations omitted] Contractors called for predetermination of prevailing wages, claiming that they had been put to unexpected expense by postcontract determinations that the prevailing wage was higher than the rate upon which they had based their bids. [citations omitted] While the labor movement was divided on this issue, most of the national leadership opposed predetermination. [citations omitted] Labor was united, however, in calling for the establishment of an enforcement mechanism. [citations omitted]
>
> * * *
>
> [I]n 1935, Congress succeeded in adding the predetermination and enforcement provisions found in the current statute. Act of Aug. 30, 1935, 49 Stat. 1011." *Universities Research Ass'n* at 1463-1464.

In view of the legislative history of the Service Contract Act and the Davis-Bacon Act, after which the SCA was modeled, respondents posed this question in the proceedings below – to what extent, if any, does application of state law in the instant case conflict with the Service Contract Act? For the reasons assigned by the Third Circuit, and the reasons set forth below, it is respectfully submitted that the Third Circuit correctly held that there was no conflict.

IV. Absent an express statement by Congress, pre-empting state law, to what extent, if any, does the assertion of a state law claim seeking payment of monies owed pursuant to an employment contract conflict with the Service Contract Act of 1965 or the purpose for which it was enacted?

Respondents have not contended that there has been any violation of the SCA by Fidelity Technologies Corporation. In fact, reference to the benefits outline issued by Fidelity Technologies Corporation to its employees will show that petitioner adopted the vacation pay required by federal law. (App. 18). This agreement between Fidelity and its employees provides in part:

> **"D. Vacation and Holiday Pay:**
>
> This policy is as established in the Fringe Benefit statement of the applicable wage determination."

The applicable wage determination is attached to the contract between Fidelity Technologies Corporation and the Seventh Signal Command. (App. 31) The applicable wage determination states that employees are entitled to the following:

> "2 weeks paid vacation after one year of service with the contractor or successor; 3 weeks after ten years of service." (App. 18)

In short, by incorporating by reference the applicable wage determination, petitioner complied with the applicable federal law designed to protect an employee from entering into an employment contract that pays less than the prevailing wages and benefits.

Where an employer hires an employee at a wage below that required by federal law, federal law provides the employee with an administrative remedy whereby the employee can seek to be paid the difference between what the parties to the employment contract had agreed upon and the actual amount to which the employee was entitled by virtue of federal law. 29 C.F.R. § 4.191. The underlying claim for which the administrative remedy is afforded is one where the employer has violated the SCA by entering an employment contract paying less than required by federal law.[1] On the other hand, the underlying right upon which respondents' suit is based is the right to payment of earned monies upon termination of employment.

The purpose of the Service Contract Act, and the purpose of the state wage laws are quite distinct from one another. To suggest a conflict between these statutes would be tantamount to an argument that the federal minimum wage law and the state statutes applicable in this case conflict with one another because the former law is intended to assure that an employer hires employees at a certain minimum wage level and the latter state law intended to assure that the employer actually pays those wages to which the employer agreed upon cessation of the employment relationship.

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[1] Prior to retention of counsel, respondents who had not yet grasped the distinction between a claim for non-payment of wages upon termination which may be brought under state law, and a claim arising out of payment of substandard wages, in fact, filed a claim for administrative relief. However, as Mr. Savant testified, the former employees never received any response from the complaint. (App. 25-26)

The lack of a conflict between the Service Conflict Act and application of Louisiana law in the instant case may be best demonstrated through contrasting one of the cases relied upon by petitioner and the present case. In *Foster v. Parker Transfer Company*, 528 F.Supp. 906 (W.D.Penn. 1981), defendant's employees, who were not paid the wage rate provided in the SCA, filed a private lawsuit against the employer to recoup wages. As the court stated, "[respondents] simply allege that these wages did not meet the levels set by the Secretary of Labor under the Service Contract Labor Standards Act." *Foster*, 528 F.Supp. at 907. In that case, the recourse provided to the employees was through the Secretary of Labor. That court expressly noted that there was no allegation that the wages paid fell below those required by the Federal Labor Standards Act, 29 U.S.C. § 201 *et seq.* Although no precise figures are stated in that case, the employees were seeking the difference between the actual wages that their employer had agreed to pay, and the actual wages required by the wage determination by Secretary of Labor pursuant to the SCA. Quite correctly, the court held that the Secretary of Labor was the authority vested with the power to enforce payment of the "prevailing labor rates". *Foster*, 528 F.Supp. at 907. The court was not called upon to decide an instance where the agreed wages were even less than minimum wage, and the implication of the case is that in such instances other remedies may be available.[2]

---

[2] In fact, where federal laws other than the SCA have been violated, courts have considered these federal laws supplemental to the SCA. See *Brown v. Luk, Inc.*, infra.

In the present case, respondents have not contended that their former employer had agreed to pay them anything more or less than that required by the wage determination of the Secretary of Labor. The wrong for which respondents have sought judicial intervention is that Fidelity Technologies Corporation did not fulfill its employment obligation existing by virtue of the employment contract existing between respondents and petitioner, as evidenced by the employee benefit outline. (App. 8-18). As the president of Fidelity admitted, the dispute was not as to the amount, but as to the entity who owed the monies, Fidelity or the company to whom the Fidelity assigned its contract, Dynamic Concepts. (App. 19).

Respondents agree that the Secretary of Labor has jurisdiction over a prevailing wage rate dispute. However, this is not the dispute in this case. The Third Circuit, Court of Appeal, correctly held that state courts retain jurisdiction to require payment of wages upon termination of the employment relationship within seventy-two hours of same and the power to impose penalties and attorney fees upon an employer who fails to comply with this state law.

V. Whether the Service Contract Act of 1965 is so comprehensive that it leaves no room for state law.

The only other basis for denying the jurisdiction of the state court to protect the rights of these Louisiana

citizens is if Congressional legislation is so comprehensive that it is said to have completely occupied an entire field.[3]

Petitioner cited to the lower courts and to this Honorable Court a number of cases to support the proposition that a service contract employee has no private cause of action under the Service Contract Act; therefore, the service contract employee has no private cause of action. *Danielsen v. Burnside-Ott Aviation Training Center*, 941 F.2d 1220 (D.C. Cir. 1991); *Foster v. Parker Transfer Co.*, 528 F.Supp. 906 (W.D.Penn. 1981); *Nichols v. Mower's News Service, Inc.*, 492 F.Supp. 258 (D.Ver. 1980); *Barron v. Reich*, 13 F.3d 1370 (9th Cir. 1994). Petitioner's argument begs the question of whether state law is wholly preempted. These cases were simply declining to fashion **from** the Service Contract Act, **itself**, a federal common law private remedy for service contract employees. In other words, the courts were declining to infer from the SCA that service contract employees could enforce their SCA right to the prevailing wage rate by a mechanism other than the administrative procedure established for disputes arising out of contractors paying less than the prevailing wage rate.

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[3] Respondents submit that the reason that the Department of Labor never acted upon the complaint filed by respondents subsequent to their termination of employment was that the dispute is simply not one in which the Secretary of Labor was interested since the matter did not involve a prevailing wage rate dispute. The fact that the Secretary of Labor never responded to the complaint hardly militates toward showing that Congressional regulation has completely occupied the entire field.

In the *Danielsen* case, relied upon by the petitioner, respondents were faced with the situation where the right to the prevailing wage rate was being circumvented by a misclassification of employees that deprived workers of the wage rate determined by the Secretary of Labor. That dispute, of course, is one to be resolved by the Secretary of Labor, and the court quite correctly held that no private cause of action could be asserted to enforce that SCA right. As the *Danielsen* court stated: "Congress provided the statutory right for a limited and governmental cause of action for underpayment." *Danielsen*, 941 F.2d at 1227. Congress, having created the right, also provided the remedy. Respondents in the instant case, however, are not asserting a cause of action for a failure to pay the prevailing wage rate, but a distinct, separate and independent claim to be paid, upon termination, that which the employer actually agreed to pay. Respondents' cause of action arises from a state statutory right, with a state statutory remedy.

The *Danielsen* court was only required to decide and only decided whether "the SCA gives rise to a private civil action under RICO"[4] where the crux of the dispute was whether or not some employee jobs had been improperly classified under the contract so as to reduce their wages to an amount below the prevailing wage rate for the work under the proper classification. *Danielsen*, 941 F.2d at 1227.

---

[4] Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1961-1968.

If Fidelity Technologies Corporation had breached the Service Contract Act by not incorporating into the employment contract the requirements of the Service Contract Act, then this case would be one of whether a federal statutory right had been violated. Once, however, Fidelity Technologies Corporation agreed to pay the prevailing wage rate, including fringe benefits, these employees became vested with that contractual right, and the Louisiana statutory laws that protect such contractual rights are not preempted by any federal law.

In a recent case, decided since the trial court ruling, *Brown v. Luk, Inc.*, 1996 W.L. 280831 (N.D.N.Y. 1996) the court expressly recognized that the Service Contract Act, Contract Work Hours and Safety Standards Act ("CWHSSA") 40 U.S.C. §§ 327-33, and the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-19 " . . . are in fact mutually supplemental which means that 'none of the three statutes are mutually exclusive of the other, [and] the provisions of all may apply so far as they are not in conflict.' " *Brown v. Luk, Inc.*, supra, quoting *Masters v. Maryland Management Company*, 493 F.2d 1329, 1332 (4th Cir. 1974). If the rights and remedies under the CWHSSA and FLSA are supplemental to the SCA, then a state statutory right and remedy may also be supplemental.

By the terms of the employee benefits outline, Fidelity Technologies Corporation agreed to pay whatever vacation pay was set forth in the applicable wage determination, namely two weeks per year after one year of service, and three weeks per year after ten years of service. (App. 18; 31) The mere fact that one must refer to a document that must be interpreted according to federal

law in order to compute the amount due each employee does not warrant preemption. That issue has been addressed by this Honorable Court in *Livadas v. Bradshaw*, 512 U.S. 107, 114 S.Ct. 2068, 129 L. Ed. 2d 93 (1994). In *Livadas*, the plaintiff sought to recover from her former employer under state law, wages due upon discharge, together with penalties for failure to tender same. The California Commissioner of Labor, vested with the authority to hear such state law claims, responded that the plaintiff was barred from enforcing any such state law claim because the plaintiff's employment was governed by a collective-bargaining agreement and therefore Section 301 of the Labor Management Relations Act, 28 U.S.C. § 185(a), precluded the state from allowing the assertion of state law remedy. This Court, however, disagreed, citing previous holdings where the Court had underscored the point:

> "[t]hat Section 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law, and we stressed that it is the legal character of a claim, as 'independent' of rights under the collective-bargaining agreement, *Lueck, supra*, 471 U.S., at 213, 105 S.Ct., at 1912 (and not whether a grievance arising from 'precisely the same set of facts' could be pursued, *Lingle, supra*, 486 U.S., at 410, 108 S.Ct., at 1883) that decides whether a state cause of action may go forward. Finally, we were clear that when the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished, see *Lingle*, 486 U.S., at 413, n. 12, 108

> S.Ct., at 1885, n. 12 ('A collective-bargaining agreement may, of course, contain information such as rate of pay . . . that might be helpful in determining the damages to which a worker prevailing in a state-law suit is entitled')." *Livadas*, 114 S.Ct. at 2078.

As in the *Livadas* case, the primary text to which a court must look to decide whether respondents are entitled to unpaid benefits together with legal interest, penalties and attorney fees is not a contract, but rather a calendar. *Livadas*, 114 S.Ct. at 2079. Since the only reason, in the present case, that a state court will even need to refer to the contract between Fidelity Technologies Corp. and the Seventh Signal Command is to compute the damages due respondents, it can hardly be stated that such a tangential relation bars respondents from seeking recourse in state court.

In *Hendrix v. Delta Air Lines, Inc.*, 234 So.2d 93 (La. App. 4th Cir. 1970), writ denied 236 So.2d 498, the court was called to decide whether federal law, in particular the Federal Labor Standards Act, 29 U.S.C.A. § 201 *et seq.*, preempted these same Louisiana wage statutes, relied upon by respondents. The court held:

> "[F]ederal law makes no provision for or against penalties for mere failure to pay admittedly due *agreed-upon* wages promptly upon termination of employment. We conclude there is no preemption on this question by the Fair Labor Standards Act, 29 U.S.C.A. § 201 *et seq.*" *Hendrix*, 234 So.2d at 95.

Respondents respectfully submit to this Honorable Court that the same result is warranted in this case in view of

the facts and in light of the law. Petitioner's writ of certiorari should be denied.

CONCLUSION

Respondents filed suit against its former employer, Fidelity Technologies Corporation, because more than two years lapsed after their termination and after respondents had first made amicable demand for their accrued vacation benefits, and still their former employer had not paid them. The suit was filed pursuant to LSA-R.S. 23:631 and 632, seeking the wage benefits, interest, penalties, and attorney fees that are rightfully imposed upon an employer who shirks its responsibilities to former employees whose services are no longer required by failing to pay what even the employer now, belatedly, admits was due and owing at termination.

Throughout these proceedings on petitioner's exception to the jurisdiction of state court, petitioner has sought to divert attention from addressing the issue, squarely addressed by the Third Circuit, Court of Appeal, namely, whether state law is preempted, by espousing a fallacious argument, employing circular reasoning, that respondents are claiming that petitioner violated the Service Contract Act, 41 U.S.C. 351 *et seq.* ("SCA"), and that the SCA provides the exclusive remedy for an SCA violation. Respondents have not asserted a claim under the SCA which is a prevailing wage rate law that allows underpaid employees, i.e., employees paid less than the prevailing wage rate, to be compensated at the prevailing

wage. Respondents have sought unpaid wage benefits due upon termination from employment.

Louisiana wage laws are a legitimate exercise of the state's police powers intended to promote the general security of its citizens, and no court has ever held that such state laws are preempted by the SCA, legislation enacted to serve an entirely different purpose. The SCA is designed to assure that a prevailing wage rate is paid. LSA-R.S. 23:631 and 632 are intended to protect employees from employers who do not pay earned wages or wage benefits upon termination.

If Congress had intended the Service Contract Act to preempt any and all state law causes of action relating to non-payment of wages, the legislative branch could have expressly stated such in the Act. There is no such provision in the SCA, and the legislative history of the Act suggests the reason there is no such provision is because Congress was enacting legislation to address a particular concern, namely, that workers may be paid substandard wages. The created federal right to the prevailing wage rate is protected by a federal remedy; however, the right to payment of earned wages, including benefits, upon termination of employment remains a state concern protected by state law. State law does not conflict with federal law on this point.

Without delving deeply into the mindset of a corporation that would think, even for a moment, that it could make its own employees wait for payment until such time as the company resolved its differences with a third party, that very thought evidences that this is not an area where Congressional legislation is so comprehensive as to leave

no room for state law. Respondents have been denied long enough full recourse against their former employer. Respondents urge this Honorable Court to deny petitioner's writ application.

Respectfully submitted,

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July 16, 1997

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VS. NO. 55876	: PARISH OF VERNON
FIDELITY TECHNOLOGIES CORPORATION	: STATE OF LOUISIANA
FILED: _____	: _____ DEPUTY CLERK

PETITION FOR DAMAGES

(Filed Dec. 8, 1994)

NOW INTO COURT, through undersigned counsel, comes plaintiffs, LONNIE B. BUTLER, AUDREY M. ANDERSON, ROBERT H. ARMER, W. L. BASCO, JR., LINDA KAY BEHAN, JAMES W. BRYANT, LOYIL W. CRYER, WAYNE DUNN, KARAN M. MAHLEN, JOSEPH T. MARTIN, MARGARET H. MAYO, FRANCES R. MELCHIORRI, DONALD R. SAVANT, RAMONA SMART, AND HAROLD STAPLES, all persons of the full age of majority and residents of Vernon Parish, State of Louisiana, appearing herein individually, who with respect represents:

1.

Defendant, Fidelity Technologies Corporation is a foreign corporation which was engaged at all times material herein in business in the State of Louisiana, at Fort Polk, Vernon Parish, where it provided maintenance and installation of telephone services.

2.

The named plaintiffs were at all times material herein employed by Fidelity Technologies Corporation at Fort Polk.

3.

On or about November 5, 1992, defendant terminated plaintiffs.

4.

Thereafter, the terminated plaintiffs made timely demand to be paid all wages including vacation benefits and other fringe benefits owed by defendant to the plaintiffs.

5.

Defendant failed to pay the vacation benefits and other benefits owed to the terminated plaintiffs within 72 hours of the date of termination and, continuing to date, have not made said payments.

6.

As a result of its actions described in paragraph 5 above, the plaintiffs have been damaged and are entitled to be made whole by relief, including but not limited to:

(a) all wages and benefits owed but not yet paid;

(b) penalty wages as provided by LSA-R.S. 23:632;

(c) legal interest on all of the above amounts;

(e) for all costs of these proceedings; and

(f) reasonable attorney fees.

7.

No individual's claim in this matter is in excess of $20,000 exclusive of legal interest and costs.

WHEREFORE, plaintiffs respectfully request and pray that after due proceedings had, the Court provide the relief specified in paragraph 6 above, along with legal interest and for all general and equitable relief.

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BY: /s/ Edward J. Fonti
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VS. NO. 55,876 A	: PARISH OF VERNON
FIDELITY TECHNOLOGIES CORPORATION	: STATE OF LOUISIANA
FILED: _____	: _____ DEPUTY CLERK

AMENDED PETITION FOR DAMAGES

(Filed Dec. 29, 1994)

NOW INTO COURT, through undersigned counsel, comes plaintiffs, LONNIE B. BUTLER, AUDREY M. ANDERSON, ROBERT H. ARMER, W. L. BASCO, JR., LINDA KAY BEHAN, JAMES W. BRYANT, LOYIL W. CRYER, WAYNE DUNN, KARAN M. MAHLEN, JOSEPH T. MARTIN, MARGARET H. MAYO, FRANCES R. MELCHIORRI, DONALD R. SAVANT, RAMONA SMART, AND HAROLD STAPLES, who amends the petition in the following respects:

1.

To add Ruby Lea Hutson as a plaintiff.

WHEREFORE, plaintiffs respectfully request and pray that after due proceedings had, the Court add RUBY LEA HUTSON as a plaintiff to this lawsuit.

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LONNIE B. BUTLER,	: NUMBER 55,876A
AUDREY M. ANDERSON,	:
ROBERT H. ARMER, W. L.	:
BASCO, JR., LINDA KAY	:
BEHAN, JAMES W.	:
BRYANT, LOYIL W. CRYER,	:
WAYNE DUNN, KARAN M.	:
MAHLEN, JOSEPH T.	: 30TH JUDICIAL
MARTIN, MARGARET H.	: DISTRICT COURT
MAYO, FRANCES R.	:
MELCHIORRI, DONALD R.	:
SAVANT, RAMONA SMART,	:
AND HAROLD D. STAPLES	:
VERSUS	: —
	:
FIDELITY TECHNOLOGIES	: VERNON PARISH,
CORPORATION	: LOUISIANA

DECLINATORY EXCEPTION OF LACK OF SUBJECT MATTER JURISDICTION

(Filed March 14, 1995)

NOW INTO COURT, through undersigned counsel, comes Fidelity Technologies, Inc., Defendant herein, and excepts to the jurisdiction of this Court on the grounds that this Court lacks subject matter jurisdiction over the claims asserted herein, because under the Services Contract Act of 1965, Plaintiffs, as service contract employees, have no private right of action for underpayment of wages or fringe benefits, including vacation pay, and their sole remedy is to seek relief by application with the

Secretary of Labor, relief which has in fact been sought and obtained.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT,
FIDELITY TECHNOLOGIES, INC.

JOINT EXHIBIT 6

FIDELITY TECHNOLOGIES CORPORATION
PROPOSED
OUTLINE OF BENEFITS
(Filed Feb. 23, 1996)

Fidelity Technologies Corporation Employee Benefits Plan:

Following is an outline of benefits under your employer sponsored health plan.

Calendar Year Deductible:

$100 per person
$200 per family

No deductible is applied to Accident Expenses incurred within 90 days of an accident.

Out-of-Pocket Maximum

After deductible, the plan pays 90% of the next $10,000 of expenses, 100% thereafter.

Per person calendar year maximum	$1,000
Per family	$2,000

Dollar Benefits

The following benefits will be paid at 100%, no deductible or co-insurance.

Pre-Admission Testing Expenses
Home Health Care Expenses
Ambulatory Surgical Center Charges
Birthing Center Expenses
Extended Care Charges

Second Surgical Opinion
Supplemental Accident Benefits

Covered Expenses

The following is a partial list of charges that will be paid subject to deductible and co-insurance (90%).

Hospital Expenses
Well Baby Care
Prescription
Surgeon – Anesthesia Charges
Durable Medical Equipment
X-ray and Laboratory
Radiation
Medical Supplies
Chemotherapy
Physiotherapy

Pre-Admission Certification

Pre-certification verifies the medical necessity of your planned hospital admission and monitors the number of days requested by your physician for your hospital stay.

Prior authorization is *required* for all non-emergency hospital admissions. Emergency admissions must be reported within 48 hours.

When your physician recommends that you or a covered family member enter a hospital, you or your physician must call National Benefits Managed Care Corporation, 1-800-999-5852, to initiate the pre-certification process. If certification is not received, a separate $100 deductible will apply to eligible benefits.

Specific Benefit Maximums

- Home Health Care Visits – 60 Visits Per Calendar Year.
- Extended Care and Rehabilitation Daily Room and Board. The plan covers the first 100 days of confinement. Confinement must start within 14 days of hospital stay and is limited to semi-private room rate.
- Hospice Care – The first $7,500 paid at 100%, the remaining charges subject to deductible and co-insurance.
- Private Nurses – Covered when medically necessary, in a recognized facility which cannot provide skilled nursing care or such care is authorized as part of a Home Health Care Plan. Plan pays 100% of visits each benefit year, up to four hours per visit.
- Birthing Center – Covered at 100% for room and board, anesthetics and charges for giving them and other services and supplies.
- Hospital Room & Board – Average semi-private room and board rate.
- Intensive Care – 3 times the average semi-private room and board rate.
- Inpatient Mental & Nervous/Substance and Alcohol Abuse – The plan pays for 60 days of confinement in a calendar year, subject to usual and customary charges.
- Outpatient Mental & Nervous/Substance and Alcohol Abuse – The plan will pay 50% of usual and customary charges up to $1,000 per calendar year.

- Pregnancy Coverage – medical expense benefits are payable for pregnancy-related expenses of employees on the same basis as for any other illness.
- Tempmandibur Joint Dysfunction (TMS) – The plan pays up to $2,500 lifetime maximum per insured.
- Infertility Testing. The Plan pays up to ~~$50,000~~ 25,000 lifetime maximum.
- Chiropractic Expense to a maximum of ~~$500~~ 1500 per calendar year.

General Exclusions

What the Health Plan Does Not Cover:

- Injury which happens during work at any job for pay.
- Sickness for which payment is made or available through workers' compensation or a similar law.
- Confinement in a United States government or agency hospital, unless you would have to pay for the expenses if you did not have coverage.
- Expenses you or your Dependent would not legally have to pay.
- Education, training, and bed and board while confined in an institution which is mainly a school or other institution for training, a place of rest, a place for the aged or a nursing home.
- Custodial care.

- Eyeglasses, eye refractions and hearing aid unless required by accidental injury which happens while covered.
- Charges incurred for any intentionally self-inflicted injury or sickness.
- Services of a person who resides in your home or is a member of your immediate family.
- Charges incurred prior to the date coverage is effective under the plan or after coverage is terminated.
- Charges incurred in connection with cosmetic surgery except to correct a condition resulting from an injury or to correct a congenital abnormality in a child born while the parent is covered.
- Charges for exogenous obesity, including any prescription drugs, nutrient supplements, surgery or other treatment.

FIDELITY TECHNOLOGIES CORPORATION

Corporate Headquarters:
2501 Kutztown Road
Reading, PA 19605
(215) 929-3330
FAX (215) 929-6861

EMPLOYEE BENEFITS OVERVIEW:

A. SAVINGS AND RETIREMENT PLAN (401k)

FIDELITY TECHNOLOGIES CORPORATION is offering a tax favored savings plan:

Who Can Join:

All full-time employees who have completed 3 months of service and attained the age of 18 are eligible to participate in the plan.

When Can You Join:

After meeting eligibility requirements, you will be able to join on any January 1st or July 1st.

How the Plan Works:

The basic operation of the Plan is simple:

- You contribute to the Plan through regular payroll deductions.
- Tax savings are added to your account
- You select from several plan options
- No taxes are paid on any earnings in your account until withdrawn.

How to Enroll:

To enroll, you complete and return an Enrollment Form that upon meeting eligibility requirements will be prepared for you indicating:

- the amount you want to contribute
- how you want your money applied
- The beneficiary to receive your account if you should die

Your membership in the Plan will begin with you first payroll deduction.

You Can Change Your Mind:

On any January 1st and/or July 1st you can

- adjust the amount of your contribution up or down
- change how your current contributions are applied
- transfer your account balance from one investment option to another
- suspend and resume your contributions.

Contributions:

There are several types of contributions to your account:

1. Your Contributions: you can contribute from 2% up to 15% of your total income from the Company.
2. Immediate Tax Savings: Each contribution saves you Federal Income Taxes, and possibly state and local taxes, depending on where you live or work. These savings are deposited into the Plan for you.
3. Tax-deferred Earnings: no taxes are paid on any earnings in the Plan until they are withdrawn.
4. Company Match: The plan will match the first 5% of your contribution at the rate of $.25 on the dollar.

   You are always 100% vested in your own contributions. Your vested interest in employer contributions is based on a schedule of 0%/20%/40%/60%/80%/100% (fully vested in 6 years.

You Select the Options:

There are various Plan options:

1. Income Account (currently yielding 8.10% interest – can increase or decrease based upon prevailing economic conditions).
2. Diversified Equity Fund (Stocks)
3. Life Insurance

Loans are available:

Loans can be made after one year's participation in the Plan.

Loans are only available from YOUR investments in the Fixed Income Account.

A minimum loan is $500.00. You can borrow up to 50% of your account to allocated maximums ($10,000.00 or $50,000.00 depending on account balance.)

All loans must be repaid with interest, within 5 years. As you repay the loan, all interest will be credited back into your account.

B. Medical Benefits Package:

Health Insurance coverage will be administered by National Benefits Corp.

Life Insurance at the rate of one time their annualized base rate (which will be doubled in the event of accidental death).

Short Term Disability which will pay a portion of your salary for the 1st day in the event of accident and the 8th day in the event of sickness and will continue for up to 90 days.

Long Term Disability will cover you if you are out or work for 90 days or more.

FIDELITY TECHNOLOGIES CORPORATION pays the premium to provide employees with individual coverage. Family coverage is provided with the additional premium being deducted from the employee's paycheck, in the amount of $ ___ per pay.

All new employees MUST be enrolled within 31 days of hire. An enrollment form should be completed and sent to Human Resources immediately upon an employee reporting to work to ensure the enrollment is done within the 31 day timeframe.

Any employee wishing to cover dependents should request insurance for his eligible dependents at the same time of his/her enrollment. If an employee has no eligible dependents initially, but acquires one at a later date, the employee should be enrolled for dependent coverage within 31 days from the date the dependent was acquired.

For further explanation of benefits covered, please refer to *Outline of Benefits* attached.

SHORT TERM DISABILITY:	**Accident**	**Sickness**
Benefit Waiting Period	0 Days	7 Consecutive days
Benefit Duration	13 Weeks	13 Weeks

Benefit calculation: The lesser of 60% of weekly basic earnings or $300.00 reduced by other applicable benefits.

Includes coverage for mental health and substance abuse. Benefits apply only to non-occupational sickness or accident. Maximum weekly benefit – $300.00.

Weekly benefits will end on the earliest of:

1. The date the employee is no longer disabled; or
2. The date the maximum benefit period shown above ends; or
3. The date the LTD benefits under this policy are payable; or
4. The date benefits become payable under any other group long-term disability policy sponsored by FIDELITY TECHNOLOGIES CORPORATION.

Weekly benefits for any week the employee works for wage or profit will be reduced by the amount earned from such work for that week.

LONG-TERM DISABILITY:

Benefit Waiting Period	90 Days
Benefit Duration	Age 65
Maximum Benefit	$3,000/month

Benefit calculation: The lesser of 60% of basic monthly earnings or $3,000/month reduced by amounts from full and other benefit sources.

C. Sick Leave/Personal Time:

Sick leave/personal time is provided as established in the Health and Welfare rate of the Wage Determination up to a maximum of five days per year.

D. **Vacation and Holiday Pay:**

This policy is as established in the Fringe Benefit statement of the applicable wage determination.

* * *

[p. 11] if he just asks an open ended question like that.

BY THE COURT:

Break it down, counsel, define your question more closely.

Q. Did you have a dispute develop over who owed vacation pay to the people that had been employed by you but began working for D.C.I. at the novation?

A. Yes, we did.

Q. What was the dispute about?

A. Dispute was which of our companies was responsible for paying the vacation pay which was accrued before the novation transfer. (EXACTLY AS STATED THROUGHOUT)

Q. And, were you and D.C.I. able to resolve that dispute?

A. No sir.

Q. When the – after the dispute remained unresolved what did you do to try to finalize or get a resolution of the matter, of the dispute?

A. Okay. Both of us jointly agreed that D.C.I. shall submit this to the agency which is responsible for resolving this kind of dispute, predominantly the Department of Labor, Wage and Hourly Division. (EXACTLY AS STATED THROUGHOUT)

Q. And, why did you believe that that was the case, why did you believe that was the person you submitted it to? (EXACTLY AS STATED THROUGHOUT)

A. Because this contract is governed by Service Contract Act of 1965 and they are the only authority that can legally force us to – or to make a determination which party is responsible and how much amount. (EXACTLY AS STATED THROUGHOUT)

Q. Is the Department of Labor the same department that makes a determination of how much you pay?

A. Yes sir.

Q. They make a determination of what fringe benefits you must

* * *

[p. 18] period, normally Government allows you thirty days to phase in, as I testified earlier, this agreement was given to us on March 1st, 1991, effective date being April 1st. This H – page H-1 says in the middle of this thing, phasing period, the phasing period shall be completed at the contract start date and shall not exceed thirty days, so, in effect, Government allows you thirty days for one contract to go in, other to come in, and, of course, in this case, we had to put out everything we could to do it because we were still liable anyway for anything that did not go right under this novation agreement, it took us a few days to transfer this responsibility over to D.C.I. on all four sites. (EXACTLY AS STATED THROUGHOUT)

BY THE COURT:

Let me ask you one other question, were you – did Fidelity Technologies make payment to these employees through November 4?

A. Yes sir.

BY THE COURT:

Were you reimbursed in any fashion by D.C.I.?

A. We were reimbursed by the Government, our Government invoice would go to Government as that being the cut off date. (EXACTLY AS STATED THROUGHOUT)

BY THE COURT:

Very well. You may proceed, counsel, excuse the interruption, I apologize.

Q. That's fine, Your Honor, I just want the facts as well. Now, Mr. Gulati, you testified that you received some instruction from the Department of Labor to pay the vacation benefits to the Fidelity Technologies Corporation employees or plaintiffs, is that correct?

A. Correct, sir.

Q. Okay. Now, isn't it a fact, sir, that the filing of this lawsuit prompted Fidelity Technologies Corporation to go to the Department of Labor and get them to give you some instruction on it? (EXACTLY AS STATED THROUGHOUT)

A. Absolutely, positively not, sir. That is not a fact.

Q. That is not a fact?

A. No sir.

Q. Is it your testimony, sir, – well, strike that. Did Fidelity Technologies Corporation receive these instructions from the Department of Labor within a few days after being served with this lawsuit?

A. That's correct, sir.

Q. And, even though you state you received these instructions within a few days after being served with this lawsuit, is it your testimony that the timing on that is purely happenstance?

A. That's correct, sir.

Q. Purely a coincidence?

A. That's a fact, sir.

Q. Mr. Gulati, do you recall on February 8th, 1996, when you were deposed by me by telephone, testifying to the affect, let me give you a copy of the deposition and I'm looking at page 61. May I approach the witness, Your Honor?

BY THE COURT:

Yes sir.

Q. I'm sorry, 62, the last question. Tell me if I'm reading that question correctly. "Isn't it a fact, sir, that the fact that this lawsuit was served upon you prompted your company to seek to resolve it's dispute with Dynamic Concepts on a more expedient basis?" And, your reply is "Absolutely not, sir." Is that your testimony?

A. That's correct, sir.

Q. Okay. And, on page 63, question, "You're stating that it was pure happenstance that you received a decision from the

* * *

[p. 29] Gerfin, made that statement.

Q. Would you please help me with that name, Mr. Steve . . .

A. Gerfin, G E R F I N, he was Fidelity Technologies representative for (INAUDIBLE).

Q. And, what was Mr. Gerfin told you?

A. I specifically asked Mr. Gerfin what, when or how we would be paid for our vacation time or sick leave time if we had any coming and he said that Fidelity Technologies would take care of that in due course.

Q. Now, at any time, Mr. Savant, before the date that this lawsuit was filed on December 8th of '94, over two years after your termination, did anyone – did Fidelity ever pay you or any of the other plaintiffs one nickel of the owed vacation benefits that were due as of December(sic) 4th of '92?

A. No sir.

Q. At any time before this lawsuit was served on Fidelity Technologies Corporation on December 19th, '94 did Fidelity Technologies Corporation pay you or any of the other plaintiffs one nickel of the accrued vacation benefits that were due back on December(sic) 4th of '92?

A. No sir.

BY MR. MADISON:

For the record we would stipulate that Fidelity Technologies Corporation and no one else paid these people any vacation pay until March of '95. I guess it was. It's not at issue.

BY THE COURT:

Is that acceptable, counsel?

BY MR. TETE:

I wouldn't say – I would agree to stipulate that they didn't tender anything until March of '95, change the word pay to tender.

BY MR. MADISON:

We will accept that modification, Your Honor.

BY THE COURT:

Very well. Move on.

BY MR. TETE:

May I approach the witness, Your Honor?

BY THE COURT:

Yes sir.

Q. Would you please identify the document that I just handed to you, sir?

A. This is a letter to Mr. Dave(sic) Ferguson, U.S. Department of Labor in Alexandria, Louisiana. It's a letter written by the former employees of F.T.C. to Mr. Ferguson asking for support in trying to get our due compensation for our vacation time. And, the letter is signed by all of the employees that had vacation time coming.

Q. And, it makes a reference to an attachment, does it not?

A. The attachment is a letter sent to Senator James David Cain, Senator John Breaux and Congressman Jim McCreary requesting their help in the matter.

Q. Does it also refer to an enclosure, sir?

A. Yes sir, a formal complaint.

Q. Okay. And, is that what is attached?

A. Yes, it is.

BY MR. TETE:

I would like to offer and introduce into evidence as P-2 this letter dated January 6, 1993.

BY MR. MADISON:

This is not a complete document that I have.

BY MR. TETE:

That's all there is.

BY MR. MADISON:

Well, it says continue on the other side, is there supposed to be another side to it?

BY MR. TETE:

I don't have the other side to it.

BY MR. MADISON:

Anyway, I don't have any objection to it.

BY THE COURT:

Very well. Let it be filed.

WHEREUPON, PLAINTIFFS' EXHIBIT NUMBER TWO WAS RECEIVED BY THE CLERK, MARKED AND FILED INTO EVIDENCE AT THIS TIME:

Q. Now, after this – you mailed this letter of January 6, 1993 to Mr. Don Ferguson?

A. Yes sir.

Q. After you mailed this letter to Mr. Don Ferguson did you ever receive any ruling on that?

A. No sir, we didn't receive an answer back from them in no shape or form, I've also called Baton Rouge, the office there and no help on it. (EXACTLY AS STATED THROUGHOUT)

Q. Are you stating you never even received any response?

A. No sir, we did not.

BY MR. TETE:

No further questions.

BY THE COURT:

Cross examination?

BY MR. MADISON:

No question, Your Honor.

BY THE COURT:

You may step down.

BY MR. TETE:

I would call to the stand next Ms. Karen Mahlen.

MS. KAREN MAHLEN, CALLED TO THE STAND, AFTER BEING DULY SWORN, TESTIFIED AS FOLLOWS:

* * *

[p. 58] provided for under the Louisiana Statute. The exception filed herein is one that says that under the Services Contract Act these matters are governed and are reposed entirely within the Department of Labor and that this court lacks jurisdiction to apply the Louisiana law to this particular dispute. I note, and, I'm referring particularly to the *Danielsen* case which is reported at 746 F.Supp. 170 and I'm referring particularly to language contained on page 175 of that decision where it's said, the purpose of the SCA, that is the Service Contract Act and I added that, was to ensure that service employees working on Government contracts are not paid wages below the prevailing wages being paid in the locality by non-government contractors. Thus, Section 2 of the Act requires the inclusion of specific provisions establishing minimum wage and fringe benefit levels in contracts entered into by the United States in excess of twenty-five hundred dollars. The principle purpose of which is to furnish services in the United States through the use of service employees. As I consider the facts in this case, I'm of the opinion that the specific purpose of the contract entered into initially by Fidelity was to furnish services in the United States through the use of service employees, that is, employees to operate and service the administrative telephone system owned by the United States Government at Fort Polk. So, I believe to that extent we come within those provisions. The next question arises, is the Services Contract Act limited to wage levels only. The

court is of the opinion that the language indicates that it is not so limited and that it includes fringe benefits and that the payment of vacation time is, in truth and in fact, fringe benefits. We then find that the wage and fringe benefit determination is specifically directed to the responsibility of the Secretary of Labor in accordance with prevailing rates for such employees in the locality. In short, I do not agree with a system that would appear to deprive litigants of a right to access to the courts. Nevertheless, I believe that is precisely what the Congress has attempted to do in this case by according exclusive jurisdiction in the Department of Labor to make these determinations. I do not believe, under those circumstances, that it's appropriate for this court to undertake to make that determination applying the law of the State of Louisiana as opposed to applying the determinations made by the Department of Labor both as to the prevailing rates and fringe benefits which would be due and as to compliance with the obligation imposed to pay the wages and fringe benefits which would be due. I do not necessarily like the decision that I am making, be that as it may, I believe that the exception is good under those circumstances and I'm going to maintain the exception and hold that this court has no jurisdiction to adjudicate this particular matter. Gentlemen, do you understand what I have said? I'm not sure anybody else will.

BY MR. MADISON:

Your Honor, would you like for us to submit a judgment?

BY THE COURT:

Please.

BY MR. MADISON:

Yes sir, we will do that.

BY MR. TETE:

Thank you, Your Honor

****END OF PROCEEDING****

U.S DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION
WASHINGTON, D.C. 20210

REGISTER OF WAGE DETERMINATIONS
UNDER THE SERVICE CONTRACT ACT
Hourly Direction of the Secretary of Labor

/s/ Alan L. Moss
Alan L. Moss
Director

Division of
Wage Determinations

LOCALITY
State: Louisiana
Area: LA COUNTIES: . ERNON

Wage Determination No.: 84-0621 (Rev. 4)
Date: 11/19/1990

Class of Service Employees	Minimum Hourly Wage
Employed on contracts for the operation and maintenance of administrative telephone system in the above LOCALITY:	
1. Switchboard Operator	$ 6.48
2. Telephone Mechanic	$ 12.72
3. Cable Splicer	$ 12.72
4. Lineman	$ 12.72

Fringe Benefit Payments

Health & Welfare	Vacation	Holiday	Other

Fringe benefits applicable to all classes of service employees engaged in contract performance: 1/ 2/ 3/

HEALTH & WELFARE: Life, accident, and health insurance plans, sick leave, pension plans, civic and personal leave, severance pay, and savings and thrift plans: Employer contributions costing an average of $1.84 per hour computed on the basis of all hours worked by service employees employed on the contract. (See 29 CFR 4.175(b))

VACATION: 2 weeks paid vacation after 1 year of service with a contractor or successor; 3 weeks after 10 years of service. Length of service includes the whole span of continuous service with the present (successor) contractor, wherever employed, and with the predecessor contractors in the performance of similar work at the same Federal facility. (Reg. 4.173)

HOLIDAYS: 10 paid holidays per year: New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day. (A contractor may substitute for any of the named holidays another day off with pay in accordance with a plan communicated to the employees involved.)

Supreme Court, U.S.
FILED
JUL 30 1997
CLERK

No. 96-2015

In The

Supreme Court of the United States

October Term, 1996

FIDELITY TECHNOLOGIES CORPORATION,

Petitioner,

v.

LONNIE B. BUTLER, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Louisiana Third Circuit Court Of Appeal

REPLY BRIEF FOR THE PETITIONER

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41 U.S.C. § 351 8

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Respondents' Brief in Opposition ("Opp.") is noteworthy in that it fails to contest, and thus effectively concedes, several key issues that are dispositive to the resolution of this case. Specifically, respondents do not deny the obvious fact that the Louisiana court's decision, if allowed to stand, will eviscerate the exclusive administrative remedy established by the Service Contract Act (the "SCA") or that this important unresolved question warrants the Court's review. As noted in our petition, few plaintiffs indeed will pursue administrative remedies when penalty damages amounting to 24 times actual damages are available under state law. The result will be a maze of inconsistent state remedies that will undermine the congressional policies of uniformity, efficiency of administration and well-defined remedies codified in the SCA's exclusive remedial regime. Given that the Louisiana court's decision would directly undermine the structure, purpose and balance of the SCA, it is clear that the state remedies at issue here must yield to the SCA under well-settled principles of preemption and exclusivity.

Despite these major concessions, respondents do advance several specific arguments that warrant a brief reply.

1. Respondents acknowledge that the SCA preempts state law claims that are based on violations of the statute. Opp. 17. Nevertheless, respondents seek to avoid the consequences of this straightforward proposition by placing artificial constraints on the scope of the SCA. Respondents suggest that the SCA applies only to cases involving *underpayment* of prevailing wages as opposed to *nonpayment* of such wages. Opp. 15 n.1, 24. As noted in the petition, Petition ("Pet.") 10 n.2, the distinction urged

by respondents and adopted by the court below has no basis in the SCA and would make no sense since an employee is underpaid by any amount that the employee is not paid. Not surprisingly, the regulations confirm that the SCA protects employees of service contractors against "underpayments (which includes *nonpayment*)." 29 C.F.R. § 4.187 (emphasis added).

Respondents also contend that the SCA has no application to their claims because the dispute here relates to *who* must pay the prevailing wages, rather than what wages are owed. This is, of course, merely a restatement of the argument that the SCA does not cover instances of nonpayment because disputes as to the identity of the employer necessarily involve nonpayment – employers who contend they are not responsible for amounts due under the SCA presumably will not have made any payments at all to their employees as to the disputed sums. Beyond the regulations cited above, respondents' own conduct, namely the filing of a complaint with the Department of Labor, demonstrates that the SCA applies to such disputes.[1]

The plain language of the SCA also confirms that the Act clearly governs this dispute. The Louisiana statute here plainly requires a "person employing such laborer or other employee to pay the amount then due under the

---

[1] Although respondents may not have been represented by counsel at the time the complaint was filed, this fact merely suggests that they followed the plain meaning of the statute and only filed suit in state court when their attorneys pointed out the possibility of recovering 24 times their actual damages under state law. *See* Opp. 15.

terms of employment" within three days of termination. Pet. App. 28. Thus, in order to resolve this state law dispute, the state court must determine both *which* "person" employed respondents and the amount due them. Both of these determinations fall within the scope of the SCA. The proper identity of the employer responsible for payment of SCA wages is plainly covered by the Act and the Act plainly authorizes the Department of Labor to resolve such disputes. 41 U.S.C. § 354. And, of course, the Department of Labor did resolve this dispute between petitioner and its assignee. It is equally obvious that the amount due under the contract is a determination for the Department. Thus, respondents' claims do not require the state court merely to look to a calendar, Opp. 22, but require the court to interpret a contract governed by the SCA and to determine the entity responsible for wages under that statute.

Thus, the issue in the Louisiana state proceedings falls within the substantive scope of the SCA as does a dispute over wage amounts – which all agree would be preempted. Allowing such state law claims poses the same dangers of erasing the Labor Department's exclusive enforcement role and creating potentially inconsistent judgments. Under respondents' view, for example, no deference is owed to determinations made by the Department of Labor as to the proper identity of the employer owing SCA wages. If this view were to prevail, a conflict might well arise between the determination made by the state court and the Department of Labor as to which party actually owed the sums due the

employees. Indeed, under this theory nothing would prevent petitioner on remand from contesting its responsibility for SCA wages in state court despite the Department of Labor's ruling to the contrary.

In sum, respondents concede that at least some disputes under the SCA fall exclusively within the jurisdiction of the Department of Labor, but fail to acknowledge that their claims, which clearly arise under the SCA, are preempted. To the extent respondent is attempting to create certain subclasses among SCA claims, some of which may only be resolved by the Department and others of which may be asserted under state law as well, this result is equally without merit. Respondents fail to identify any support in either the statute itself or in logic that would justify this anomalous and unworkable result. Indeed, the congressional policies of promoting uniformity of relief and efficiency in administration with a minimum of litigation apply with equal force to all disputes arising under the SCA.

2. Respondents simply ignore this Court's precedents which make clear that the SCA preempts Louisiana law. *See, e.g.*, Pet. 22-26. Specifically, respondents do not contest that the Louisiana statute is preempted both because it impermissibly establishes "a multiplicity of tribunals" to resolve disputes arising under the SCA, *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243 (1959), and because it "interfere[s] with Congress' integrated scheme of regulation by adding a remedy to those prescribed by [an exclusive remedial scheme.]" *Wisconsin Dep't of Indus. v. Gould, Inc.*, 475 U.S. 282, 287 (1986) (internal citations omitted). Rather, respondents argue that the state statute cannot be preempted absent a clear

statement that Congress intended the SCA to have such preemptive effect. Opp. 7 (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992)). This unduly narrow understanding of this Court's preemption cases is, of course, inconsistent with respondents' own concession that the SCA has preemptive force as to disputes over prevailing wage disputes. Opp. 17. Moreover, respondents' reliance on *Cipollone* is misplaced since the clear statement rule applies only in express preemption cases and has no application where preemption is implied from the structure and purpose of the Act.

Respondents contend that the Louisiana court's decision is consistent with the purpose of the SCA because it "penalizes" employers for nonpayment of wages and fringe benefits. But the fact that the Louisiana law "penalizes" the employer with sanctions beyond those authorized by the SCA confirms, rather than refutes, its inconsistency with the Act. Excessive additional state penalties inherently vitiate the exclusive nature of the SCA's remedial scheme and would disrupt the delicate balance struck by Congress in enacting the SCA and similar statutes.[2] Indeed, this very point is established by the case upon which respondents primarily rely. This Court has explained that Congress, in enacting the Davis-Bacon Act, which concededly served as the model for the SCA, was well-aware of the concerns of contractors that

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[2] As noted in the petition, the SCA is one of over 55 similar statutes that mirror the Davis-Bacon Act's requirement that employees of federal contractors receive wages prevailing in their locality.

they would be "put to unexpected expense by post-contract terminations" if an administrative enforcement mechanism were not established. *Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 775 (1981); Opp. 13. Both the Davis-Bacon Act and its successor acts, such as the SCA, "carefully balance[ ] the interests of contractors and their employees." *Id.* The administrative enforcement mechanism established by these statutes allows a contractor to "know definitely in advance of submitting his bid what his approximate labor costs will be" and thus ensures that contractors will not have to "submit inflated bids to take into account the possibility that they would have to pay wages higher than those set forth in the specifications." *Id.* at 782-83 (internal citations omitted). If employees were allowed to circumvent this enforcement regime by pursuing their claims for violations of the SCA and similar acts in state court, federal contractors would be confronted with the very type of uncertainty that Congress intended to foreclose by establishing an exclusive remedial regime.

Additionally, this Court has made clear that the goal of these exclusive enforcement mechanisms was "to introduce consistency into the administration and enforcement of the Act and related statutes." *Id.* at 783. The Court has acknowledged the obvious fact that "[t]he uniformity fostered by [this regime] would be short-lived if courts were free to make postcontract coverage rulings." *Id.* In short, the important congressional purposes of uniformity and certainty that are inherent in an exclusive administrative enforcement regime will be eviscerated if the Louisiana court's decision is allowed to stand. Moreover, there is no principled basis to limit such a ruling to

the context of the SCA, and thus the decision below could logically be extended to each of the other statutes that perform a similar function as the SCA. Such a result "would be so inconsistent with the legislative scheme underlying the right [to a minimum prevailing wage] as to be unthinkable." *Danielsen v. Burnside-Ott Aviation Training Ctr., Inc.*, 941 F.2d 1220, 1227 (D.C. Cir. 1991). Thus, a state law which *increases* the monetary remedies properly owed by an employer under the SCA is no more "consistent" with the Act than a law which *decreases* such remedies, to the detriment of employees.

3. In a last-ditch effort to avoid the preemptive effect of the SCA, respondents cite several cases acknowledging that other *federal* statutes are "mutually supplemental" to the SCA. Respondents contend that state law that is "supplemental" to the SCA should also not be preempted. At the most rudimentary level, respondents' contention is correct insofar as the SCA does not preempt state laws that fall outside its scope. Thus, employees of federal service contractors may bring suit under state civil rights laws for unlawful discrimination since such actions do not infringe on the exclusive remedial jurisdiction of the Department of Labor. It is equally obvious that Congress has passed statutes that regulate other aspects of the employment relationship between federal service contractors and their employees. And, as the Fourth Circuit has recognized, some such federal statutes are directly intended to supplement the substantive provisions of the SCA. *See, e.g., Masters v. Maryland Management Co.*, 493 F.2d 1329 (4th Cir. 1974). The Fourth Circuit's conclusion that the Fair Labor Standards Act complements the SCA is hardly surprising since Congress

in the legislative history of the SCA clearly manifested its intent for both statutes to act in concert to insure that employees of federal contractors receive a minimum wage. *See, e.g.*, Revision Notes in Legislative Reports, 41 U.S.C. § 351. Thus, *Masters* merely stands for the unremarkable proposition that Congress has passed several federal labor laws that act to complement and reinforce one another.

As the D.C. Circuit made clear in *Danielsen*, however, even federal laws that are inconsistent with the SCA's exclusive remedial scheme will be "preempted" or, more precisely, rendered inoperative as to SCA claims. 941 F.2d at 1226-27. Under respondents' theory, however, *state* laws that directly infringe on the Department's exclusive remedial authority should not be preempted and thus should be afforded greater vitality and scope than analogous federal statutes. In *Danielsen* the court held that the federal courts cannot resolve disputes that were entrusted to the Department of Labor under the SCA. Yet, the exclusive enforcement mechanism under the SCA would be more greatly disrupted by permitting inconsistent state laws than by allowing federal courts to grant a private right of action under the Act. If the decision below were allowed to stand, there would be 50 different forums adjudicating such disputes pursuant to many different substantive standards and remedies. As the extravagant penalty damages sought by respondents demonstrate, there is enormous potential for conflicting substantive results under such a regime. Surely, such a method for enforcing the SCA is anathema to the congressional purpose embodied in the Act's exclusive administrative remedy.

Finally, respondents' argument fails even on its own terms because the state law they invoke would not truly "supplement" the SCA, but rather would supplant it. As previously noted, few plaintiffs will pursue the SCA's administrative remedy when penalty damages and attorneys' fees are available under state law. Beyond the deleterious practical consequences of such an enforcement regime, even the cases relied on by respondents clearly reject attempts "to circumvent the SCA's administrative scheme by essentially labeling their prevailing wage rate and holiday claims as arising under [other statutes]." *Brown v. Luk, Inc.*, No. 95-CV-1780, 1996 WL 280831, *4 (N.D.N.Y. May 10, 1996). In rejecting "such a maneuver," *id.*, the lower courts have followed this Court's admonition that a plaintiff may not evade an exclusive remedial scheme " 'by the simple expedient of putting a different label on (the) pleadings.' " *Brown v. General Serv. Admin.*, 425 U.S. 820, 833 (1976) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973)).

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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